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1	Nov 17 1994	G	Petition for writ of certiorari filed.
3	Dec 12 1994		Brief of respondent Robert E. Henry in opposition filed.
2	Dec 14 1994		DISTRIBUTED. January 6, 1995 (Page 30)
5	Jan 9 1995		REDISTRIBUTED. January 13, 1995 (Page 19)
7	Jan 17 1995		REDISTRIBUTED. January 20, 1995 (Page 17)
8	Jan 23 1995		Petition GRANTED. Judgment REVERSED. Concurring opinion by Justice Souter with whom Justice Ginsburg and Justice Breyer join. Dissenting opinion by Justice Stevens. Opinion per curiam.

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No. 94-

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1994

William Duncan, Warden, ***Petitioner,***

v.

Robert E. Henry, ***Respondent.***

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a *habeas corpus* petitioner "fairly presented" a federal constitutional claim to a state court, within the meaning of *Anderson v. Harless,* 459 U.S. 4 (1982), when he alleged only a violation of state evidence law, cited only state appellate cases, invoked no federal constitutional principles, and relied ultimately upon a state-law standard of harmless error reserved for non-constitutional claims; and whether such a rule can be invoked by the federal court to grant relief to a state prisoner without violating the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989).

2. Whether the admission of evidence against a defendant in a criminal case that logically tends to prove a material element of a crime, or is at worst irrelevant, can be elevated to a due process violation by a federal *habeas corpus* court; and whether such a rule can be invoked by the federal court to grant relief to a state prisoner without violating the non-retroactivity doctrine of *Teague*.

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No. 94-____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1994

William Duncan, Warden, ***Petitioner,***

v.

Robert E. Henry, ***Respondent.***

Petitioner, on behalf of the State of California, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed May 18, 1993, and amended August 19, 1994.

OPINION BELOW

The original opinion of the United States Court of Appeals for the Ninth Circuit was reported at 993 F.2d 1423, and was amended upon the denial of rehearing. 33 F.3d 1037.[1/]

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1. Wayne Estelle, the former Warden of the California Mens Colony at Luis Obispo, has been replaced by William Duncan as Warden. Thus, William Duncan is the petitioner in this petition.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 18, 1993, and amended on August 19, 1994. Rehearing was denied on August 19, 1994. This petition for writ of certiorari followed within 90 days. 28 U.S.C. § 2101(c); Supreme Court Rule 13.1, 13.4. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION

Title 28, section 2254 provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
> (b) A application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process ineffective to protect the rights of the prisoner.

STATEMENT OF THE CASE

A. State Proceedings

Respondent Robert Henry was charged in state court with seven counts of child molestation.

Andrew Walker, ten years old at the time of his testimony at the Henry's trial, had attended kindergarten and first and second grade at St. Paul's Church and Day School. RT 378.[2/] There Andrew had met Henry, who was the rector of the church and dean of the school.

One time, Andrew recalled, he was sitting on a bench in the principal's office waiting for his parents to pick him up at noontime. RT 380-381. Henry called Andrew into his office. Henry closed the door behind them. No one else was present. Henry told Andrew to lie down on the couch and pull down his pants. RT 381-382. Henry touched him on his penis. RT 382. Andrew thought that the rubbing lasted about three minutes. Henry told him to pull up his pants and go back to the bench outside his office to wait for his parents. RT 384.

Andrew was not angry and did not know what had happened to him. He did not know whether Henry had done something bad to him. RT 385. Andrew loved Henry because he was nice. RT 386. He thought Henry was close to God. RT 387. In his testimony, testimony, Andrew could not recall how old he was at the time of the incident.

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2. "RT" refers to the reporter's transcript of trial proceedings in *People of the State of California v. Robert E. Henry* (Ventura County Superior Court No. CR23041).

Elizabeth Ryan, the principal of St. Paul's for 17 years, testified that she remembered an incident where she came out of Henry's office and saw Andrew sitting on the bench outside his door. Henry called Andrew into his office and closed the door behind him. RT 446. It was about 11:45 a.m. and Andrew was waiting to be picked up by his parents from kindergarten. She thus concluded that the incident occurred in 1985. RT 467.

Ms. Ryan also saw Andrew go into Henry's office with the door closed behind him on one other occasion, when Andrew was in first grade. On this occasion, Andrew had been sent out from his classroom because he was having difficulties. Henry took Andrew, who had taken his books with him, into his office. RT 468-469.

Ms. Ryan became more acquainted with Andrew than with other kindergartners because he was having difficulty in school. Andrew was open with her and she never knew him to tell a lie. RT 470-471.

Ms. Ryan further testified about the layout of Henry's office. There was a couch sofa under a window with drapes. Henry generally kept the drapes closed. RT 462-464. There was a walkway for the students that went by the windows. The drapes were a close, thick net, and they were not lined. RT 480. It was easier to see out of Henry's office when the drapes were closed than it was to see in. RT 510. Ms. Ryan remembered that sometimes his office would become hot and stuffy, but she did not recall ever seeing the drapes or windows open. RT 481.

In April 1987 the wife of the police chief told Tomoko Yeh, a local parent, that Henry was suspected of molesting Andrew. RT 398-407. Mr. and Mrs. Yeh confronted Henry on April 30. Henry stated that something had happened, but that it was a matter of

interpretation. He denied molesting Andrew. RT 402. Henry seldom looked at their faces during the meeting. He looked at the ground and seemed nervous. RT 400. Mr. Yeh kept a notebook of these events because he was medical doctor and he feared that a large problem might be developing. RT 401.

Mrs. Yeh became concerned for the welfare of her own children. She wanted to ask Henry to keep his door open at all times to protect the children. RT 401-413 Mrs. Yeh began to cry during the interview since she felt uncomfortable because Henry was unable to look at them. RT 402-403. Mr. Yeh told Henry, "You should leave medical exams up to medical profession." RT 403. Henry mentioned during the conversation that he had problems with the Walker family 20 years ago in Pomona. RT 414.

Henry also told him that he was going to meet with Andrew's father, Steve Walker, to tell him some things that he did not know about. RT 441-442.

Thomas Hackett lived in Pomona, California, from 1962 until 1972. RT 743-744. His son Timothy, now 30 years old, attended St. Paul's Episcopal day school in Pomona from the third to the sixth grade where Henry was the rector. RT 744-745.

In 1969, Mr. Hackett's son told him that Henry had touched him. When Mr. Hackett confronted Henry, respondent stated that he had been counseling Timothy for an emotional problem which caused him to grab himself when nervous. RT 745. Henry intimated that Timothy was grabbing his penis. Timothy's own account indicated that Henry had molested him. Henry stated that Tim had been mistaken, and that Henry had not touched him. RT 746-748.

After a jury trial in the state superior court in Ventura,

California, Henry was convicted of one count involving Andrew. As to the additional counts, which involved another boy, Henry was acquitted of one, and a mistrial was declared as to the other five. On November 29, 1988, Henry was sentenced to six years in prison.

Henry appealed his conviction to the California Court of Appeal. Henry challenged, on state-law evidentiary grounds, the admission of the evidence of Mr. Hackett's accusation regarding Timothy. The Court of Appeal affirmed, holding that, although the trial court had erred under state law in admitting the evidence regarding Mr. Hackett's earlier accusation against Henry, the error was harmless under a standard of review reserved for non-federal state law claims. Henry's subsequent petition for review in the California Supreme Court, asserting the same state law error, was denied.

B. Federal Proceedings

Henry then filed a petition for writ of habeas corpus in the United States District Court for the Central District of California. There, he argued that the admission of evidence of the Hackett accusation amounted to a constitutional violation of his right to due process. On May 10, 1991, a magistrate judge recommended granting the petition. By order filed May 20, 1991, the District Court adopted the magistrate judge's recommendation.

The State appealed to the Court of Appeals for the Ninth Circuit. On May 18, 1993, the court affirmed the judgment of the district court. 993 F.2d 1423. The State filed a petition for rehearing. On August 19, 1994, in a divided opinion, the Court of Appeals denied rehearing and amended its earlier decision. (Appendix

A.) The panel determined, first, that Henry had "exhausted" his federal constitutional claim in state court because the state law claim he raised there was based upon the "same arguments" asserted in support of his federal claim. The panel also determined, on the merits of the claim, that the admission of the evidence had violated due process because the evidence was irrelevant and prejudicial. The author of the original decision dissented from the amended majority opinion.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

1.

The Ninth Circuit's 2-to-1 published opinion in this case has furnished state prisoners and their counsel with a blueprint that accomplishes two pernicious goals: circumventing the exhaustion rule and 'federalizing' issues of pure state law.

The panel's divided opinion permits a state prisoner to obtain federal review of claims previously raised only as state law error through the simple expedient of adding federal constitutional language to a federal petition. Under this opinion, the Ninth Circuit will allow a constitutional challenge to be raised for the first time in federal habeas proceedings if the arguments that support the claim are "essentially the same" as those supporting the earlier state law-based challenges, regardless of whether the arguments would alert a state court to account for federal constitutional law in disposing of the claim. As the dissent in this case recognizes, the majority's opinion is at odds with *Anderson v. Harless,*

459 U.S. 4 (1982), which requires state prisoners to alert the state court to both the facts and the legal theory comprising a federal claim before proceeding to federal court.

Under *Henry,* a state prisoner who has intentionally or inadvertently withheld a federal constitutional claim in favor of a pure state law claim in state court no longer needs to abide by the exhaustion rule. To open the doors of a federal court, and to obtain a writ of habeas corpus, he need only file a petition in the United States District Court and reiterate his earlier claim of error and prejudice, now adding the magic words "federal due process" or "federal constitutional violation." In this manner, state prisoners now may simply delay raising a constitutional challenge until they have bypassed state courts, a tactic the exhaustion rule was intended to foreclose. The Ninth Circuit opinion eviscerates *Anderson v. Harless* and effectively eliminates the exhaustion rule in California and in other western states.

The error underlying the panel's exhaustion analysis threatens even worse harm than that of allowing prisoners premature and improper access to a federal forum. For the panel's exhaustion analysis itself depends upon the Circuit's continuing misapprehension that a state law error affecting the trial result somehow amounts by itself to a constitutional due process violation. The panel fundamentally misperceives the difference between state law error and a federal constitutional violation, that is, when it concludes that a claim of state law error which is outcome determinative states a federal constitutional claim because each claim

represents "essentially the same arguments." In adhering to this discredited notion, the Ninth Circuit signals its reluctance or refusal to heed the lesson this Court tried to teach when it criticized the Ninth Circuit for committing this very mistake in the earlier cases of *McGuire v. Estelle* and *Blair v. McCarthy.* *Estelle v. McGuire,* 112 S.Ct. 475, 481 & n. 2 (1991). See also *Jiminez v. Myers,* 12 F.3d 1474 (9th Cir. 1994) [dis. opn. of Kozinski, J.; *Fetterly v. Paskett*, 15 F.3d 1472 (9th Cir. 1994) as amended 1994 U.S. App. Lexis 4012 [dis. opn. of Kozinski, J.].

Compounding the initial error of elevating Henry's state-law claim to a federal constitutional one, the Ninth Circuit in *Henry* went further and granted Henry *habeas corpus* relief on the theory that the admission of irrelevant evidence had violated the Due Process Clause. But here the evidence was not irrelevant: the evidence instead was logically relevant on the theory that where a defendant gives common explanations for similar charges of misconduct, it is reasonable to infer at least that the explanations are contrived. This case, then, at least presents a question addressed but not explicitly settled in *Estelle v. McGuire,* 112 S.Ct. 475, 481 (1991): *i.e.,* whether the admission of evidence that logically tends to prove a material fact can ever properly be condemned as a due process violation. At most, if the challenged evidence here was irrelevant, this case presents a related question explicitly left open in *McGuire:* "the assumption of the [Ninth Circuit] Court of Appeals that it is a violation of the due process guaranteed by the Fourteenth Amendment for evidence that is not relevant

to be received in a criminal trial." 112 S.Ct. at 481.

4.

In view of the national importance of these issues, involving exhaustion and the basic difference between state law and federal constitutional violations, and in light of the conflicting treatment of these issues in the Circuits, we believe the need for review by this Court is manifest.

ARGUMENT

I.

A STATE PRISONER WHO IN POST-CONVICTION REVIEW IN STATE COURT ALLEGES ONLY A VIOLATION OF STATE LAW, CITES ONLY STATE CASES AND RELIES ONLY ON STATE HARMLESS ERROR STANDARDS HAS NOT FAIRLY PRESENTED A FEDERAL CLAIM WITHIN THE MEANING OF 28 U.S.C. § 2254 AND *ANDERSON V. HARLESS*, 459 U.S. 4 (1982)

1.

Convicted of child molestation in state court, respondent Henry appealed to the California Court of Appeal, asserting the trial court had erred under state law in admitting certain evidence against him. Henry, assisted by counsel, relied exclusively on state cases and the state constitution. He did not mention the federal constitution or cite any federal cases. Specifically, he did

not contend the alleged error in the admission of evidence was of federal constitutional dimension as a due process violation. Instead, he maintained that the applicable standard of prejudice was the test reserved for errors of state law. In further state appeals, Henry never relied upon any federal constitutional provisions, federal statutes or federal decisions.

Following affirmance of his conviction by state appellate courts, Henry filed a petition for a writ of habeas corpus in the federal district court. In his federal petition Henry contended, for the first time, that the erroneous admission of evidence amounted to a due process violation in violation of the federal constitution.

The federal district court granted a writ of habeas corpus. The Court of Appeals for the Ninth Circuit affirmed in a divided published decision. In doing so, the panel first determined that Henry had satisfied the requirement of exhaustion of state remedies even though "Henry did not label his claim a federal due process violation." 33 F.3d at 1040. Notwithstanding that, the panel asserted, Henry's state law evidentiary claim coupled with his statelaw based claim of harm presented "essentially the same arguments" that a federal due process claim would have presented. 33 F.3d at 1041.

2.

The flaws in this opinion are as easily identifiable as its grave consequences. As stressed by the dissent, the Ninth Circuit has interpreted the exhaustion rule in a manner that brings the case -- and, by implication, all Ninth Circuit precedent -- into conflict with this Court's decision in *Anderson v. Harless,* 459 U.S. 4 (1982). This Court in *Harless* rejected the Sixth Circuit's conclusions

that "the due process ramifications" of Harless' argument to the Michigan court were "self-evident" and that Harless' reliance on a state case was sufficient to present the state court with the substance of a due process challenge to a jury instruction. 459 U.S. at 6. The Court should similarly reject the Ninth Circuit's conclusions in this case.

The Ninth Circuit in *Henry* simply excuses state prisoners from complying with the exhaustion rule. If this case stands, a state court claim of error and prejudice under state law will now be accepted by federal *habeas* courts throughout the Ninth Circuit as an "exhausted" federal constitutional claim in 28 U.S.C. section 2254 habeas proceedings.

A state prisoner should not be entitled to merely present state claims to a state court, argue prejudicial error and, upon rejection, go up the street to the federal court by the simple expedient of converting the claim into a federal issue by adding federal claim language. But that is just what occurred in this case. Once in the federal district court, Henry added the phrase "due process" to 'federalize' what otherwise had been a pure issue of state evidence law into a federal constitutional challenge. In allowing him to do so, the Ninth Circuit eviscerated the requirement that there must be a "fair presentation" of the federal claim to the state courts in the first instance. *Picard v. Connor,* 404 U.S. 270, 275, (1971). And, in doing so, it also ignored the fundamental difference between state law errors and fundamental federal constitution violations, *Estelle v. McGuire,* 112 S.Ct. 475 (1991).

The importance and validity of the exhaustion doctrine, which requires state prisoners to first seek relief on their federal claims in state court before seeking *habeas corpus* relief in federal court, cannot be gainsaid. *Rose v. Lundy,* 455 U.S. 509 (1982). Section 2254 of Title 28 of the United States code specifically provides that a habeas application "shall not be granted" unless the petitioner has exhausted the remedies available in state court.

The requirement of "fair presentation" implements the exhaustion rule. *Picard v. Connor,* 404 U.S. 270 (1971). The exhaustion rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts. *Id.,* at 276. Only if the state courts had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. *Id.*

Thus, under *Picard,* 28 U.S.C. § 2254 requires a petitioner "to provide the state courts with a fair opportunity to apply controlling legal principle to the facts bearing upon his constitutional claim." *Anderson v. Harless,* 459 U.S. 4, 6 (1982)(per curiam). It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made. *Id; White v. Peters,* 990 F.2d 338, 341 (7th Cir. 1993). As this Court said in *Keeney v. Tamayo-Reyes,* __ U.S.__, 112 S.Ct. 1715, 1720 (1992), this rule is serious and meaningful. A petitioner must make more than a perfunctory jaunt through the state court system. *Mallory v. Smith,* 27 F.3d 991, 994 (4th Cir. 1994). "The ground relied upon must be

presented face-up and squarely, the federal question must be plainly defined. Oblique references which hint that a theory may be lurking in the woodwork will not turn the trick." *Martens v. Shannon,* 836 F.2d 715, 717 (1st Cir. 1988).

4.

Here, Henry filed an appeal in the California Court of Appeal following his conviction for child molestation. Henry has been represented by private counsel, the law firm of O'Melveny and Myers, at all relevant times.[3/] In that state appeal, he claimed the trial court had erred under state law in admitting evidence, Mr. Hackett's testimony, of a prior accusation against him. Henry relied exclusively on state cases and the state Constitution. He did not invoke the federal Constitution and argued only a violation of state law. Specifically, he did not contend the alleged error in the admission of evidence was of constitutional dimension as a due proces violation.[4/]

On the contrary, Henry specifically maintained that the applicable standard of prejudice was the "miscarriage

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3. While habeas petitions prepared by pro se litigants may be held to less stringent standards, formal pleadings drafted by lawyers are not. *Boag v. MacDougall*, 454 U.S. 364, 365 (1982) (per curiam); *Hughes v. Rowe*, 449 U.S. 5, 9 (1980).

4. Compare *Terrovona v. Kincheloe, supra*, 852 F.2d 424, 429 (9th Cir. 1988) [Petitioner, whose *pro se* petition was liberally construed, made at least passing reference to federal constitution.]

of justice" test reserved for errors of state law set forth in *People v. Watson,* 46 Cal. 2d 818, 835-836, 299 P.2d 243 (1956) cert den. 355 U.S. 846 (1957). See Cal. Const., Art. VI, § 13. In citing and relying on *Watson,* Henry disavowed any claim of federal constitutional error, for adjudication of such a claim on appeal would have required consideration of the standard for harmlessness of federal constitutional violations established in *Chapman v. California,* 386 U.S. 18, 24 (1967).

The crucial distinction between *Watson* and *Chapman* is this: under *Watson,* the effect of state law error is tested to determine whether it is reasonably probable the result would have been different absent the error; under *Chapman*, a finding of constitutional error triggers a fundamentally different inquiry into whether the error was harmless beyond a reasonable doubt.[5/] The California Supreme Court therefore invariably differentiates between cases of state law error requiring application of *Watson,* where the defendant bears the burden of proving probable prejudice, and cases of federal constitutional error requiring application of

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5. In *West v. Wright*, 931 F.2d 262, 265 (1991), revd. on other grounds, *Wright v. West*, __ U.S.__, 112 S.Ct. 2482 (1992) the Fourth Circuit found that a *habeas* petitioner had exhausted a sufficiency of the evidence claim because, *inter alia*, his state court challenge was not "the 'more -likely - than-not" standard of rationality but rather was the more stringent 'beyond a reasonable doubt' standard for assessing the sufficiency of particular evidence . . . ." 931 F. 2d at 265.

Chapman, where the burden to show the error was harmless beyond a reasonable doubt rests on the state. See, e.g., *People v. Brown,* 46 Cal. 3d 432, 250 Cal. Rptr. 604, 758 P.2d 1135 (1988); *People v. Odle,* 45 Cal. 3d 386, 414-415, 247 Cal. Rptr. 137, 754 P.2d 184 (1988); *People v. Lee,* 43 Cal. 3d 666, 671-676, 238 Cal. Rptr. 406, 738 P.2d 752 (1987). *O'Neal v. McAnirch, et. al.*, Docket No. 93-7407 [argued October 31, 1994].

The Ninth Circuit majority in *Henry* reasoned that respondent at all times made a claim "essentially" the same as a federal constitutional one because he used the phrase "miscarriage of justice" in state court. *Henry* asserted that the *Watson* "miscarriage of justice" standard is similar to the standard now used by a federal court in reviewing a collateral challenge on *habeas*; "whether the testimony had a 'substantial and injurious effect or influence' on the verdict." 33 F.3d at 1041. But the Ninth Circuit was wrong. As is clear from *Watson,* the "miscarriage of justice" language of the state constitution sets out a harmless-error inquiry, not a standard for determining the existence of error or impermissible unfairness in the first place. The *Watson* "miscarriage of justice" harmless-error standard requires an inquiry into an error's probable effect on the result, not into due process unfairness. 299 P.2d at 254. The use of the terms "miscarriage of justice," then, signals no federal claim but rather reinforces its absence by citing a standard of review applicable only to state claims.

"[W]e do not imply that [petitioner] could have raised the [due process] claim only by citing 'book and verse on the federal constitution.'" *Picard v. Connor,* 404 U.S. at 277-278. It is "the substance" of the federal claim that must first be presented to the state court, *id.*, and "in such a manner that it must have been likely to

alert the court to the claim's federal nature." *Nadworny v. Fair,* 872 F.2d at 1097. "The appropriate focus, therefore, centers on the likelihood that the presentation in state court alerted that tribunal to the claim's federal quality and approximate contours. The inquiry, in our view, is foremost a question of probability." *Id.*, at 1098.

To presume that a "functionally identical" state claim would alert California jurists to its federal constitutional implications would be unfair to state judges and to state prisoners alike. As Judge Brunetti recognizes in his dissent in this case, had Henry presented a federal claim to the state courts he would have argued the error so infected the trial as to render it fundamentally unfair, thereby acquiring federal due process dimensions and requiring analysis under *Chapman v. California,* 386 U.S. 18 (1967). *Chapman,* in contrast to *Watson,* would have mandated reversal unless the *state* showed that the constitutional error was "harmless beyond a reasonable doubt."" Instead of applying such an analysis and properly dismissing Henry's federal petition, the Ninth Circuit has now declared that a claim is exhausted, and that *Anderson* and *Picard* are satisfied, if the petitioner has presented "essentially the same argument." 33 F.3d at 1041.

But that only begs the question. The California Court in this case, employing a different analysis, was asked only to find asserted state law evidentiary error harmless under a standard more forgiving than that of *Chapman v. California*. Henry relied on state law and, not surprisingly, the California Court of Appeal interpreted Henry's claim as based on state law. The court found error under state law. Applying the appropriate standard of prejudice, the California Court of Appeal affirmed Henry's conviction. As in *Harless,* "it

is plain from the record that this constitutional argument was never presented to, or considered by, the . . . Courts." *Id.* While the due process ramifications of Henry's claims may be apparent to the Ninth Circuit majority in Henry's case, they were apparent to Henry's counsel since they were never previously alleged, nor were due process ramifications apparent to the California Court of Appeal when it applied the standard of error reserved for violations of state law.

The majority attempts to rescue its finding of exhaustion by resorting to this Court's recent decision in *Brecht v. Abrahamson,* 507 U.S. __ (1993). *Brecht,* according to the panel, parallels *Watson* in its standard of prejudice calculus; and therefore, the panel concludes, Henry exhausted his claim.

Brecht is not a case about fair presentation for purposes of exhaustion. Nor is it a case that shows how to identify the existence of federal constitutional error. It is, instead, a case about the standard of prejudice to be applied on collateral review to federal constitutional errors that already have been ascertained to exist in a given case.[6/] The case at bar is a case about exhaustion and about what constitutes a violation of the constitution, without regard to harmless error. The threshold issue in the present case, simply, is whether Henry told the state appellate court he was raising a federal claim. (See, e.g., *Anderson v. Harless; Deters v. Collins,* 985 F.2d 789, 795 (5th Cir. 1993); *Nadworny v. Fair,* 872 F.2d 1093 (federal petitioner must raise constitutional claim "in such a

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6. The panel never requested that the parties submit briefs on the application of *Brecht*, which was decided more than a year after oral argument in this case.

manner that it must have been likely to alert the court to the claim's federal nature.")

Federal judges should not presume that state judges are clairvoyant. *Petrucelli v. Coombe,* 735 F.2d 684, 689, (2d Cir. (1984). The state appellate judges here were presented with a claim based exclusively on state law and properly analyzed it as such. See *Anderson v. Harless.* The fact that, years later, this Court would reformulate the standard of prejudice on federal *habeas* review in *Brecht* is of no consequence in determining whether Henry adequately raised a federal issue in state court.

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The significance of the Ninth Circuit's error is great, not only on the procedural question of exhaustion, but also on the substantive question of what comprises a true claim of federal constitutional error. To find a fair presentation of a federal claim in this case only because federal buzz words were belatedly inserted into the federal petition is to blindside the state courts; and the theory upon which the panel's exhaustion analysis rested threatens ultimately to reverse final state judgments because of mere state law errors.

In reaching its exhaustion decision, the Ninth Circuit yet again has failed to heed either this Court's general teaching on the difference between state law and federal-constitutional error or this Court's specific criticism of previous failures by the Ninth Circuit's to observe that difference in other cases. This Court has often emphasized that a federal court conducting *habeas* review is limited to deciding whether a conviction violates the constitution, laws, or treaties of the United States. *McGuire,* 112 S.Ct. at 480-481; *Rose v. Hodges,*

423 U.S. 19, 21 (1975) (per curiam). As this Court made clear in *McGuire,* however, such state law violations provide no basis for federal habeas relief. 112 S.Ct. at 480. Surely, then, assertion of such state law violations provide no basis for exhaustion of a federal constitutional claim.

Moreover, this Court recently has pointed out that the Ninth Circuit erroneously had based grants of habeas relief, as it has done in this case, solely on a violation of state law that allegedly prejudiced that defendant by affecting the result of the state trial. This Court rejected the Ninth Circuit's approach in *Estelle v. McGuire,* 112 S.Ct. 480 (1991), and used the occasion to further criticize the Circuit for making the same mistake in *Blair v. McCarthy,* 881 F.2d 602 (1989), cert. granted, 498 U.S. __, vacated as moot and remanded, 498 U.S. __, (1990). *McGuire,* at n. 2. The Circuit nevertheless has repeated that same mistake in the case at bar, and continues to do so even in the face of further internal criticism in yet other cases. *Jiminez v. Myers, supra,* 12 F.3d 1473 [dis. opn. of Kozinski, J.]; *Fetterly v. Paskett, supra*, 15 F.3d 1472 [dis. opn. of Kozinski, J.].

The majority's holding that a contention of state law error and prejudice resembling *Brecht* fairly presents a federal claim (33 F.3d at 1041 and n. 1) violates *Teague v. Lane*, 489 U.S. 288 (1989) because it creates a new rule on collateral review.

II.

THE ADMISSION OF RELEVANT EVIDENCE CANNOT VIOLATE THE DUE PROCESS CLAUSE

Estelle v. *McGuire*, 112 ___ 475, 481 (1991)

considered whether the admission of logically relevant evidence can ever constitute a due process violation, and expressly reserved the question of whether due process can be violated by the admission of irrelevant evidence. If petitioner is correct, the former issue is presented in this case. If the Ninth Circuit majority is correct, the latter issued is presented.

Where, as here, a defendant gives common explanations for similar charges of misconduct, it is reasonable to infer that the explanations are contrived. The only evidence of consequence is his explanation. Henry's explanations upon confrontation were sufficiently similar that they were probative of the fact that he had given a strangely similar explanation twice. In both instances he implied he had touched the boys in a discrete place. Both were very odd scenarios in which Henry used his role as "counselor" to justify, when confronted, a physical "examination" or touching. The evidence, including his prior explanation, therefore possessed logical relevance. See 2 Wigmore, Evidence (Chadbourn rev. 1979) § 302 at p. 241; Imwinkelried, Uncharged Misconduct Evidence (1984) §2:20, 4:01.[7]

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7. By implication, the Ninth Circuit has also preemptively doubted the constitutionality of new Federal Rule of Evidence 413 because the majority rejects the permissibles inferences from this misconduct evidence.

Rule 413 states that in a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on

Some guidance has been offered by this Court in *Moore* v. *Illinois*, 408 U.S. 786 (1972). There the Court declined to find that the presentation of evidence was so irrelevant as inflammatory so as to deprive a state prisoner of due process. *See also Donnelly* v. *De Cristoforo*, 416 U.S. 637 (1979).

Henry's case presents this Court with an opportunity to clarify the "narrowly drawn" operation of the due process clause in this context, a clause that the Court has already said has "limited operation." *Dowling* v. *United States* 110 S.Ct. 668, 674 (1990).

Apart from the charge as to which the challenged evidence was admitted, Henry was charged with six other counts relating to another child. Yet the jury acquitted Henry of one count and deadlocked in various combinations on the others. The jury thus already knew Henry was charged, in numerous counts, with molesting another child. They nevertheless carefully analyzed the evidence and considered each witness individually. A limiting instruction properly constrained the jury's interpretation of the contested evidence. (*See Huddleston v. United States*, 485 U.S. 681 (1988). The California Court of Appeal specifically found that the fact of an acquittal and a deadlock as to the remaining charges "indicates they continued to evaluate the evidence without being swayed by prejudice."

The prior accusation evidence in this case, even if irrelevant, squarely presents the issue left open in *McGuire*; whether due process is violated merely by the introduction of irrelevant evidence. This Court has cautioned that the line of fundamental fairness is "very narrowly drawn." *Dowling v. United States, supra*, 110

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any manner to which it is relevant.

S.Ct. at 674. Ostensibly, *McGuire* and *Brecht* clarified that line. It is ironic, to say the least, that those cases have now been interpreted by the Ninth Circuit in a manner that completely blurs the line. Review is therefore appropriate.

Finally, the Ninth Circuit's holding on the merits separately violates *Teague v. Lane, supra*, and creates a new rule within the Circuit.

In sum, the decision of the Ninth Circuit majority in this case creates a new and erroneous retroactive rule, and should not have been applied on collateral review. We therefore respectfully request the Court grant a Writ of Certiorari.

CONCLUSION

For the foregoing reasons, the petitioner Duncan requests that a Writ of Certiorari issue in this case.

DATED: November 16, 1994.

Respectfully submitted,

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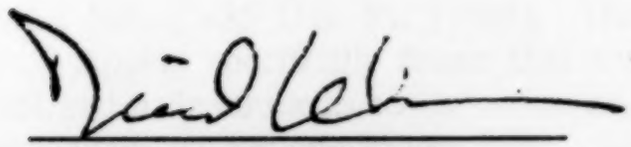

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT E. HENRY,
Petitioner-Appellee,

v.

WAYNE ESTELLE, Warden,
Respondent-Appellant.

No. 91-55691

D.C. No.
CV-90-4064-RMT

ORDER
AMENDING
OPINION and
DENYING
PETITION FOR
REHEARING and
REHEARING
EN BANC and
AMENDED
OPINION

Appeal from the United States District Court
for the Central District of California
Robert M. Takasugi, District Judge, Presiding

Argued and Submitted
October 9, 1991—Pasadena, California

Filed May 18, 1993
Amended August 19, 1994

Before: Betty B. Fletcher, Dorothy W. Nelson, and
Melvin Brunetti, Circuit Judges.

Per Curiam; Dissent by Judge Brunetti

SUMMARY

Criminal Law and Procedure/Due Process/ Habeas Corpus

The court of appeals affirmed a district court order. The court held that the admission of inflammatory testimony from which no permissible inferences could be drawn warranted reversal of a defendant's conviction.

Appellee Robert Henry was tried for molesting a boy named Andrew. Andrew, who was ten years old, testified that Henry, a rector of a church and dean of the church's day school, called him into his office alone while Andrew was waiting for his parents to pick him up. Andrew testified that Henry touched him on the penis.

Members of the church, Tomoko and Tobias Yeh, testified for the prosecution. The Yehs stated that they had confronted Henry about the incident, and Henry said something had happened, but that it had been misinterpreted. They also stated that Henry denied molesting Andrew.

Henry contended that the molestation could not have occurred because the area outside his office was normally bustling with people, and observers could see through the drapes on his office window. After the prosecution rested and the defense presented its evidence, the prosecution moved to reopen its case in chief to present the testimony of Thomas Hackett. Hackett testified that in 1969 his 11-year-old son attended a church school, where Henry was rector. Hackett stated that his son told him that he was touched by Henry. Hackett said that when he confronted Henry, Henry responded that his son was mistaken. The trial judge allowed Hackett's testimony to be admitted, finding that the exchange between Hackett and Henry resembled the meeting between the Yehs and Henry because it was a similar confrontation, with a similar denial and explanation. The judge ruled that

when the defendant used the same excuse to explain his conduct on more than one occasion, his prior statements were admissible to prove the falsity of the explanation. The trial judge attempted to minimize the danger of the testimony by giving a cautionary jury instruction.

Henry appealed his conviction to the California Court of Appeal, contending that the introduction of the testimony was contrary to California law and that its introduction resulted in a "miscarriage of justice" under the California Constitution. The court of appeal ruled that the admission of the testimony was error because Hackett's testimony was not probative of any material issue unless the jury improperly assumed the earlier accusation was false, and that the instruction virtually required the forbidden inference that Henry was a person of bad character or a person with a disposition to commit bad acts. However, the court of appeal ruled that the error was not prejudicial. Henry's petition for review to the California Supreme Court was rejected.

Henry filed a habeas corpus petition in the district court. The court granted the petition, adopting a magistrate's finding that Henry exhausted his state remedies and the error violated his due process right to receive a fundamentally fair trial. Appellant warden Wayne Estelle appealed.

[1] Henry's federal habeas claim was that the erroneous admission of evidence at his state criminal trial, followed by the jury instruction, violated his federal constitutional right to due process and was so prejudicial as to require reversal of the conviction. In his direct appeal in state court, Henry did not label his claim a federal due process violation. However, Henry did present "the substance of the federal claim" in state court. [2] Henry made "essentially the same arguments" before the state and federal courts regarding both the existence of federal constitutional error and the prejudicial impact thereof. Thus, he exhausted his state post-conviction remedies.

[3] The admission of the Hackett testimony and the subsequent jury instruction violated Henry's federal due process rights. In addition, the error was sufficiently prejudicial as to warrant reversal. [4] Hackett's testimony was not probative of any material issue in the case; without evidence from which the jury could determine Henry's statement to Hackett was false, the statement to Hackett had no probative value; there were no permissible inferences the jury could have drawn from Hackett's testimony, and it was so inflammatory as to necessarily have deprived Henry of a fair trial. [5] Furthermore, the testimony and subsequent jury instruction were highly prejudicial. [6] Hackett's testimony implied that Henry lied to Hackett and thus also to the Yehs, despite the fact that no evidence was presented to show that Henry's explanation to Hackett was false. [7] The trial court's jury instructions only compounded the prejudicial effect.

Circuit Judge Brunetti dissented, stating that Henry did not provide the California courts with a fair opportunity to apply the legal principles controlling his federal due process claim. He failed to exhaust his state court remedies.

COUNSEL

Everett B. Clary, O'Melveny & Myers, Los Angeles, California, for the petitioner-appellee.

David F. Glassman, Deputy Attorney General, Los Angeles, California, for the respondent-appellant.

ORDER

The opinion filed at 993 F.2d 1423 is amended as follows:

At 993 F.2d 1424, replace "Brunetti, Circuit Judge:" with "Per Curiam:"

At 993 F.2d 1424, second column, third line from bottom, change "and that" to "because"

At 993 F.2d 1425, first column, third full ¶, line 8, after "was error" insert: "because Hackett's testimony was not probative of any material issue unless the jury improperly assumed the earlier accusation was false,"

At 993 F.2d 1426, first column, first full ¶, replace last two sentences with: "In his direct appeal in state court, Henry did not label his claim a federal due process violation; he argued rather that Hackett's testimony was erroneously admitted because irrelevant and inflammatory, and that its admission resulted in a "miscarriage of justice" under the California Constitution. Cal. Const. art. VI, § 13."

At 993 F.2d 1426, first column, second full ¶, delete paragraph break; delete first sentence, including footnote 1; after second sentence insert: "Thus, under *Picard* and *Anderson*, exhaustion requires only that petitioner fairly present "the substance of the federal claim" in state court. *Id.* at 262."

At 993 F.2d 1426, first column, second full ¶, last sentence, replace "state law evidentiary error was" with "erroneous admission of the testimony and the instructional error were"

At 993 F.2d 1426, delete text from "Thus, when reviewing. . ." to the end of paragraph [middle of second column], and replace with: "Henry's federal due process claim is that the admission of Hackett's testimony, along with the instructions concerning it, deprived him of a fair trial. He argues that Hackett's testimony was not probative of any material issue in his case unless the jury assumed a fact about which it had heard no testimony: that Hackett's son's accusation was true. He further argues that the jury instructions encouraged the jury to make this impermissible, highly prejudicial assumption. His claim is thus that "there are *no* permissible inferences the jury may draw" from Hackett's tes-

timony, and that it is "of such [inflammatory] quality as necessarily prevents a fair trial." *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991); *see also Estelle v. McGuire*, 112 S. Ct. 475, 481 (1991) (inflammatory evidence that is irrelevant may work a due process violation).

Henry made "essentially the same arguments," *Tamapua*, 796 F.2d at 262, in his opening brief to the California Court of Appeal. He claimed that Hackett's testimony was "not relevant – it had no tendency to prove or disprove any disputed fact that was of consequence to the determination of the action." He added that the jury instruction "compounded the error" because, in encouraging the jury to see Hackett's testimony as relevant, it "as much as said that defendant had molested [Hackett's son] 20 years before." The Court of Appeal agreed, and wrote in its disposition that Hackett's testimony, while "inherently inflammatory," had "no probative value at all."

At 993 F.2d 1426, second column, first full ¶, replace first sentence with: "We reach the same conclusion as to the essential identity of Henry's state and federal arguments regarding the prejudicial effect of the error."

At 993 F.2d 1426, second column, first full ¶, line 5, delete "the defendant can show that" and replace "[him]" with "[defendant]"

At 993 F.2d 1426, second column, first full ¶, lines 17-18, delete "the petitioner shows that"

At 993 F.2d 1427, first column: On lines 6-7, replace "Henry must prove that" with "we must inquire whether"

On lines 11-12, replace "the burden is on the defendant to show that" with "reversal is required if"

On lines 14-15, delete "Henry had failed to show that", and on line 16 replace "he" with "Henry"

On line 18, delete "Henry had failed to show that"

At 993 F.2d 1427, second column, first ¶, line 10, change semicolon after "in the case" to a period, and replace rest of ¶ with: "As the California Court of Appeal stated in its opinion, "[t]he only way [Henry's] denial or the accompanying exculpatory explanatory statement would be probative at all is if it showed consciousness of guilt. To do this, [his] earlier statement would have to be shown to be false . . . ." The court noted that the jury heard no evidence regarding the truth or falsity of Hackett's son's accusation, and therefore had no basis on which to judge the truth or falsity of Henry's denial of that accusation. The court therefore concluded, "without evidence from which the jury could determine [Henry's] statement to Hackett was false *it had no probative value at all* (emphasis added)." We agree. There were no permissible inferences the jury could have drawn from Hackett's testimony, and it was so inflammatory as to necessarily have deprived Henry of a fair trial. Its admission therefore violated Henry's due process rights."

At 993 F.2d 1428, first full ¶, last line before block quote, insert footnote after "prejudicial," to read: "We reject the Court of Appeal's conclusion that the inflammatory impact of Hackett's testimony was diminished in this case because "evidence was properly received on six similar charged offenses involving a different victim [Michael]" and if jurors were to be prejudiced against appellant it was from that more specific testimony that bias may have arisen. Henry was not convicted on any of these charges and was *only* convicted of the charges involving Andrew."

Except for the above amendments, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The petition for rehearing en banc was circulated to the full court. An active judge of this court requested a vote as to

whether the case should be reheard en banc. Less than the required majority of the non-recused active judges voted to take the case en banc.

No further petitions for rehearing or rehearing en banc will be entertained. The mandate shall issue forthwith.

Judge Brunetti dissents from this order and files herewith a dissent to the amended opinion.

OPINION

PER CURIAM:

This is an appeal from a grant of habeas corpus by the United States District Court for the Central District of California. Petitioner Robert Henry contends that he was denied due process at his trial for child molestation because evidence of an uncharged crime was erroneously admitted and then followed by a jury instruction emphasizing that same evidence. The district court found that Henry had exhausted his state remedies and that the testimony in question was so inflammatory as to infect the entire trial and preclude fundamental fairness. We affirm.

Facts and Proceedings Below

Henry was tried for seven counts of child molestation before a jury in the Superior Court of California. He was charged with one count of molesting a boy named Andrew and six counts of molesting a boy named Michael. Henry was found guilty of the count involving Andrew, a mistrial was declared as to five of the counts and Henry was acquitted of one count. He was sentenced to six years in prison.

The incident involving Andrew allegedly occurred when Andrew was attending St. Paul's Church and Day School and

Henry was the rector of the church and dean of the school. Andrew could not remember if he was in kindergarten or first grade at the time of the incident. He was ten years old and in fourth grade at the time of his testimony.

On the day in question, Andrew was apparently outside Henry's office waiting for his parents, who were late, to pick him up. Andrew testified that Henry called Andrew into his office alone and closed the door behind them. Henry allegedly told Andrew to lie on the couch and pull down his pants. Andrew stated that Henry then touched him on the penis for about three minutes. Andrew was then told to leave the office and wait for his parents.

Henry contends that molestation could not have occurred during this incident. Henry knew that Andrew's parents were late and could arrive at any moment. Furthermore, the area outside the office was normally bustling with adults and children. There was a window in Henry's office that looked out onto walkways used by the children, and observers apparently could see through the drapes on this window.

At trial, Tomoko and Tobias Yeh, members of St. Paul's Episcopal Church and parents of children who attended the school, testified for the prosecution. In April 1987, Ms. Yeh was told by the wife of the police chief that Henry was believed to have molested Andrew. The Yehs confronted Henry, who allegedly stated that something had happened but that it had been misinterpreted, and denied molesting Andrew.

After the prosecution rested and the defense presented its evidence, the prosecution moved to reopen their case in chief to present the testimony of Thomas Hackett. Hackett was prepared to testify that almost twenty years earlier Hackett's eleven-year-old son told him that Henry had touched him. When Hackett confronted Henry with the allegation, Henry allegedly responded that he had been counseling Hackett's son for an emotional problem which caused him to grab him-

self when nervous, and that the son was mistaken about the touching.

The trial judge found that the exchange between Hackett and Henry resembled the meeting between the Yehs and Henry because it was a similar confrontation, with a similar denial and explanation. The judge ruled that when the defendant used the same excuse to explain his conduct on more than one occasion, his prior statements were admissible to prove the falsity of the explanation. Henry objected that the evidence had no probative value because there was no evidence to show that the prior explanation to Hackett had, in fact, been false. Henry also objected to the prejudice caused by the introduction of the testimony. The trial judge overruled these objections.

Hackett then testified that in 1969 his eleven-year-old son attended a church school, where Henry was rector of the church. His son informed him that he was touched by Henry, and Hackett confronted Henry with the information. Henry responded that he had been counseling the son on a problem the son had regarding his grabbing himself when he was nervous. Henry did not indicate where the son was grabbing himself, but Hackett felt Henry's intimation was that the son was grabbing his penis. Hackett testified he then told Henry that, according to his son's story, it sounded more like molestation. Henry responded that his son was "mistaken or misunderstood, words to that effect."

The trial judge attempted to minimize the danger of the testimony by giving a cautionary jury instruction, part of which read:

> Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show that the defendant's present out-of-court explanation, if you find that it was made, of his conduct, is not genuine.

> When a defendant uses a similar explanation of his conduct on more than one occasion, his prior statements may, if found to have been made, show that his present explanation, if found to have been made, is not genuine.

Henry appealed his conviction to the California Court of Appeal. He argued that the introduction of the testimony was contrary to California law and that its introduction resulted in a "miscarriage of justice" under the California Constitution, article VI, section 13. The Court of Appeal unanimously ruled that the admission of the testimony was error because Hackett's testimony was not probative of any material issue unless the jury improperly assumed the earlier accusation was false, and that the instruction, instead of alleviating the risk of error, virtually required the forbidden inference that Henry was a person of bad character or a person with a disposition to commit bad acts. However, the majority ruled that the error was not prejudicial because it was "not reasonably probable a different result would have been reached in the absence of the admission of this evidence."

After rehearing was denied and his petition for review to the California Supreme Court was rejected, Henry filed a habeas corpus petition in the United States District Court for the Central District of California. The district court granted the petition, adopting the United States Magistrate's finding that Henry had exhausted his state remedies and that the error violated Henry's due process right to receive a fundamentally fair trial.

Standard of Review

We review de novo the district court's decision on a habeas corpus petition. *Thomas v. Brewer*, 923 F.2d 1361, 1364 (9th Cir. 1991).

Discussion

1. *Exhaustion of state remedies.*

A state prisoner must exhaust his state remedies before petitioning for a writ of habeas corpus in federal court. 28 U.S.C. § 2254(b); *McQueary v. Blodgett*, 924 F.2d 829, 833 (9th Cir. 1991). Principles of comity and deference underlie the exhaustion requirement, which assures that the state courts will have the first " 'opportunity to pass upon and correct' alleged violations of" state prisoners' federal rights. *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971) (quoting *Fay v. Noia*, 372 U.S. 391, 438 (1963)).

To satisfy the exhaustion requirement, the petitioner must have fairly presented the substance of his federal claim to the state courts. *Picard v. Connor*, 404 U.S. 270, 277-78 (1971). The purpose of this "fair presentation" requirement is to "provide the state courts with a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (quoting *Picard*, 404 U.S. at 276-77). We have held that a federal claim "is fairly presented if the petitioner has described the operative facts and legal theory upon which his claim is based." *Tamapua v. Shimoda*, 796 F.2d 261, 262 (9th Cir. 1986).

[1] There is no doubt that Henry presented the "operative facts" to the California court. The question is whether he presented the "legal theory." Henry's federal habeas claim is that the erroneous admission of evidence at his state criminal trial, followed by the jury instruction, violated his federal constitutional right to due process and was so prejudicial as to require reversal of the conviction. In his direct appeal in state court, Henry did not label his claim a federal due process violation; he argued rather that Hackett's testimony was erroneously admitted because irrelevant and inflammatory, and that its admission resulted in a "miscarriage of justice" under the California Constitution. Cal. Const. art. VI, § 13. However, to state a federal due process claim it is not necessary to invoke "the talismanic phrase 'due process of law' " or cite "book and verse on the federal constitution;" petitioner need only make "essentially the same arguments" before the state and federal courts to exhaust a claim. *Tamapua*, 796 F.2d at 262-63. Thus, under *Picard* and *Anderson*, exhaustion requires only that petitioner present "the substance of the federal claim" in state court. *Id.* at 262. We find that Henry has done so, regarding both his argument that the erroneous admission of the testimony and the instructional error were a violation of his federal due process right and his argument that the error was so prejudicial as to warrant reversal.

As to the first point, it is well established that denial of due process in a state criminal trial "is the failure to observe that fundamental fairness essential to the very concept of justice. [The court] must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." *Lisenba v. California*, 314 U.S. 219, 236 (1941). Henry's federal due process claim is that the admission of Hackett's testimony, along with the instructions concerning it, deprived him of a fair trial. He argues that Hackett's testimony was not probative of any material issue in his case unless the jury assumed a fact about which it had heard no testimony: that Hackett's son's accusation was true. He further argues that the jury instructions encouraged the jury to make this impermissible, highly prejudicial assumption. His claim is thus that "there are *no* permissible inferences the jury may draw" from Hackett's testimony, and that it is "of such [inflammatory] quality as necessarily prevents a fair trial." *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991); *see also Estelle v. McGuire*, 112 S. Ct. 475, 481 (1991) (inflammatory evidence that is irrelevant may work a due process violation).

Henry made "essentially the same arguments," *Tamapua*, 796 F.2d at 262, in his opening brief to the California Court

of Appeal. He claimed that Hackett's testimony was "not relevant – it had no tendency to prove or disprove any disputed fact that was of consequence to the determination of the action." He added that the jury instruction "compounded the error" because, in encouraging the jury to see Hackett's testimony as relevant, it "as much as said that defendant had molested [Hackett's son] 20 years before." The Court of Appeal agreed, and wrote in its disposition that Hackett's testimony, while "inherently inflammatory," had "no probative value at all."

We reach the same conclusion as to the essential identity of Henry's state and federal arguments regarding the prejudicial effect of the error. Under California law, a miscarriage of justice is reversible only when "it is reasonably probable that a result more favorable to [defendant] would have been reached in the absence of the error." *Watson*, 299 P.2d at 254. The federal standard, recently set forth by the Supreme Court in *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993), is phrased somewhat differently, but is essentially the same test; the Supreme Court held that in reviewing a collateral challenge based on a "trial-type" constitutional error, a federal court will not reverse the conviction unless the error " 'had substantial and injurious effect or influence in determining the jury's verdict.' " *Id.* at 1722 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

The errors that occurred at Henry's trial – the introduction of Hackett's testimony and the subsequent jury instruction – were clearly errors of the "trial type" because they "occurred during the presentation of the case to the jury". *Arizona v. Fulminante*, 111 S. Ct. 1246, 1264 (1991). Therefore, under the new *Brecht* harmless error standard, we must inquire whether the testimony had a "substantial and injurious effect or influence" on the verdict.[1] This standard is similar to the

[1] *Teague v. Lane*, 489 U.S. 288 (1989), does not bar the retroactive application of the *Brecht* standard to Henry's case. *Teague* held that a new constitutional rule of criminal procedure may generally not be applied retroactively to a case on collateral review. *Id.* at 307. However, *Teague* also held that "once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." *Id.* at 300 (quotation omitted). Because the Supreme Court applied the *Brecht* standard to Brecht himself, *Brecht*, 113 S. Ct. at 1722, "evenhanded justice" thus requires that we apply it to Henry as well.

Watson standard used by California courts; under both tests, reversal is required if the error had a significant inculpatory impact. When the California Court of Appeal determined that it was "reasonably probable" that Henry would have been acquitted had the Hackett testimony not been introduced (the *Watson* standard), it effectively determined that the testimony had a "substantial and injurious effect or influence" on the outcome (the *Brecht* standard).

[2] Henry has thus made "essentially the same arguments" before the state and federal courts regarding both the existence of federal constitutional error and the prejudicial impact thereof. We hold that he has exhausted his state post-conviction remedies.

2. *Due process violation.*

[3] We next consider whether in light of the record as a whole, the admission of the Hackett testimony and the subsequent jury instruction violated Henry's federal due process right; if so, we must then determine whether the error was sufficiently prejudicial as to warrant reversal. We answer both questions in the affirmative.

[4] The admission of inculpatory testimony violates due process only "if there are *no* permissible inferences the jury may draw from the evidence" and the testimony is "of such quality as necessarily prevents a fair trial." *Jammal*, 926 F.2d at 920 (quotation omitted). *See also McGuire*, 112 S. Ct. at 481-82 (1991). Hackett's testimony was not probative of any

material issue in the case.[2] As the California Court of Appeal stated in its opinion, "[t]he only way [Henry's] denial or the accompanying exculpatory explanatory statement would be probative at all is if it showed consciousness of guilt. To do this, [his] earlier statement would have to be shown to be false . . . ." The court noted that the jury heard no evidence regarding the truth or falsity of Hackett's son's accusation, and therefore had no basis on which to judge the truth or falsity of Henry's denial of that accusation. The court therefore concluded, "without evidence from which the jury could determine [Henry's] statement to Hackett was false *it had no probative value at all* (emphasis added)." We agree. There were no permissible inferences the jury could have drawn from Hackett's testimony, and it was so inflammatory as to necessarily have deprived Henry of a fair trial. Its admission therefore violated Henry's due process rights.

[5] Furthermore, the testimony and subsequent jury instruction were highly prejudicial. The prosecution's case against Henry was not particularly strong. The main prosecution witness was Andrew himself, who was only six or seven years old when the alleged molestation occurred. The defense offered evidence that cast doubt on Andrew's testimony, such as the fact that people could see through the windows of Henry's office and the fact that Andrew's parents were late and could have arrived at any point during the occurrence of the alleged molestation.

[2]This fact distinguishes Hackett's testimony from the prior injury evidence at issue in *McGuire*. There, the defendant had been tried for the killing of his infant daughter, and the prosecution had introduced evidence indicating that the baby had earlier suffered rectal tearing and fractured ribs. *McGuire*, 112 S. Ct. at 478. McGuire was convicted and subsequently sought habeas relief on the ground that this prior injury evidence was irrelevant and highly prejudicial. *Id.* at 479. The Supreme Court held that the evidence was relevant because it tended to show that the baby's death was not accidental and thus was probative of intent. *Id.* at 480-81. Here, however, Hackett's testimony did not tend to make any of the elements of the charged offense more likely.

[6] The prosecution bolstered Andrew's testimony with that of the Yehs, who testified they had heard rumors that Henry had molested Andrew; when they confronted Henry with that allegation, Henry responded that something had happened but that it had been misinterpreted. Hackett's testimony implied that Henry lied to Hackett and thus also to the Yehs, despite the fact that no evidence was presented to show that Henry's explanation to Hackett was false. As the magistrate pointed out, Hackett's testimony was particularly prejudicial given the "emotionally charged atmosphere present in any child abuse prosecution."

[7] The prejudicial nature of the testimony was magnified by its timing. The prosecution was allowed to re-open its case-in-chief to present Hackett as the last witness, and he testified on the day of closing arguments. The prosecutor emphasized the testimony at length in his closing argument. The trial court's jury instructions only compounded the prejudicial effect. The California Court of Appeal found that it was error to admit the testimony of Hackett and, although it found the error not to be prejudicial,[3] noted:

> The instruction given to the jury, while advising them the former accusation and denial cannot be used to show appellant has bad character or a disposition to commit such acts but only to determine whether his out-of-court explanation of his conduct is genuine, of necessity required the jury to focus on the prior accusation to determine whether his present denial was not true. The only way such a determination could be made is to assume the earlier accusa-

[3]We reject the Court of Appeal's conclusion that the inflammatory impact of Hackett's testimony was diminished in this case because "evidence was properly received on six similar charged offenses involving a different victim [Michael]" and if jurors were to be prejudiced against appellant it was from that more specific testimony that bias may have arisen. Henry was not convicted on any of these charges and was *only* convicted of the charges involving Andrew.

> tion was true. The instruction virtually requires the inference the first part of the instruction appears to forbid.

The instruction was given not once but twice: once directly before Hackett's testimony and again during the general jury instructions.

We hold that the testimony and jury instruction were highly prejudicial, and they rendered Henry's trial fundamentally unfair and denied him due process. We find that Henry has shown that the testimony and jury instruction had a "substantial and injurious effect or influence" on the jury's verdict, and the district court's order granting the petition is affirmed.

AFFIRMED.

BRUNETTI, J., dissenting.

The majority relies on this court's decision in *Tamapua v. Shimoda*, 796 F.2d 261 (9th Cir. 1986), to find that Henry satisfied the exhaustion requirement. While it is not for this panel to call *Tamapua* itself into question, I believe that the majority's interpretation of *Tamapua* as controlling the outcome here brings *Tamapua* into conflict with the Supreme Court's decision in *Anderson v. Harless*, 459 U.S. 4 (1982).

My review of the state court record compels me to conclude that, contrary to the requirement of *Anderson*, Henry did not provide the California courts with a fair opportunity to apply the legal principles controlling his federal due process claim. As a result, Henry failed to exhaust his state court remedies and the majority errs in reaching the merits of his petition.

I

Our review of Henry's state court proceedings must be governed by the Supreme Court decision in *Anderson*. *Anderson* refined the standard declared in *Picard v. Connor*, 404 U.S. 270 (1971), that "the substance of a federal habeas corpus claim must first be presented to the state courts," *id.* at 278, and set forth this guiding principle: "28 U.S.C. § 2254 requires a federal habeas petitioner to provide the state courts with a fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim. . . . [T]he habeas petitioner must have fairly presented to the state courts the substance of his federal habeas corpus claim." 459 U.S. at 6 (citations and internal quotations omitted).

In *Anderson*, the Court reversed the Sixth Circuit's affirmance of a federal district court's conditional grant of Harless's application for a writ. The challenge to Harless's state trial involved a jury instruction on whether malice should be implied from the defendant's use of a weapon. In Michigan state court, Harless had presented the operative facts upon which his federal claim would be based, argued that the instruction was reversible error, and cited a Michigan decision grounded in state law only. Harless's federal *Sandstrom* claim[1] addressed the same instruction and also argued that its use represented error. The Supreme Court held that Harless had not exhausted this claim in state court, in that exhaustion required more than presentation to the state courts of all facts necessary to support the federal claim, and *more than* that a "*somewhat similar* state-law claim was made." *Id.* (emphasis added). *Anderson* thus demands a close examination of the record.

The majority opinion here turns instead on *Tamapua*'s gloss on *Anderson*, which seems to allow a finding of exhaustion if Henry's state court claim of miscarriage of justice was

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[1] *See Sandstrom v. Montana*, 442 U.S. 510 (1979).

"essentially the same argument," *Tamapua*, 796 F.2d at 262, as a claim of denial of federal due process. Unfortunately, reliance on this *Tamapua* phrase is improvident and misleading, for it directs us away from the real basis of *Anderson*.

In *Tamapua*, this court said that a claim is fairly presented if the petitioner has described the operative facts and legal theory upon which his claim is based, even if he subsequently reformulates his claims somewhat. The decision equated "operative facts *and* legal theory" to the "substance" of the claim. 796 F.2d at 262 (emphasis added).

Tamapua had persistently argued in state court that the indictment and evidence were insufficient, and that the act for which he had been convicted was not a crime. We stated that Tamapua's argument before this court was "essentially the same," although it now carried a federal due process label. The court concluded that Tamapua's state court claims had satisfied the fair presentation requirement because Tamapua's primary contention in state court proceedings was that he had been convicted with insufficient evidence, and that sufficiency of the evidence used to convict is a fundamental concern of the due process clause. 796 F.2d at 262-63 (citing *In re Winship*, 397 U.S. 358, 364 (1970)). Moreover, the *Tamapua* court observed that:

> In Tamapua's reply brief to the state supreme court, he correctly cited *State v. Lima*, 64 Haw. 470, 474, 643 P.2d 536, 539 (1982), for the proposition that "it is well established as a precept of *constitutional* as well as statutory law that an accused in a criminal case can only be convicted upon proof by the prosecution of every element of the crime charged beyond a reasonable doubt."

Id. at 263. Declaring that exhaustion did not mean that Tamapua must have "invoke[d] the talismanic phrase 'due process of law' in the state proceedings to gain access to the federal courts," the court decided that "the Hawaii Supreme Court had a full and fair opportunity to address the substance of Tamapua's claims." *Id.*

The crux of *Tamapua* was this judgment that the Hawaii Supreme Court had had a full and fair opportunity to address the substance of Tamapua's federal claim. Contrary to the assertion of the majority here, *Tamapua* did *not* set up a new exhaustion test based upon whether "essentially the same" arguments were made in state and federal courts. I can discern no such standard from *Anderson* and *Picard*, and I believe the majority now erroneously creates such a test by employing the *Tamapua* language in contravention of *Anderson*'s teaching. *Tamapua* is necessarily only an application of *Anderson* and *Picard*, not a novel legal precedent.

I thus disagree with the majority's use of *Tamapua* here. *Anderson* requires that the specific federal constitutional argument must be presented to or considered by the state court. *Anderson*, 459 U.S. at 7. The Supreme Court there *rejected* the Sixth Circuit's conclusions that "the due process ramifications" of Harless's argument to the Michigan court were "self-evident" and that reliance on a state-court case was sufficient to present the state court with the substance of his due process challenge to the malice instruction. Henry's state challenge had the same defect.

The majority's reading of *Tamapua* is unnecessary; it is also wrong because it permits outcomes that contradict the specific requirements and holding of *Anderson*.

II

As *Anderson* requires, let us compare the claim Henry actually made in state court to the substance of his federal claim in habeas, and then consider whether the state courts had a fair opportunity to apply the controlling federal legal principles to the facts bearing on Henry's constitutional claim.

Anderson, 459 U.S. at 6-7; *Tamapua*, 796 F.2d at 263. In both cases, Henry argued that admission of the Hackett testimony was reversible error, but the similarity largely ends there.

The state law claim was that: (1) admission of the testimony was error under the California Evidence Code; and (2) the error required reversal because it had resulted in a "miscarriage of justice" under Article VI, § 4 1/2 (now § 13) of the California Constitution. Given the elaboration of this standard in *People v. Watson*, 46 Cal. 2d 818, 836, 299 P.2d 243 (1956), *cert. denied*, 355 U.S. 846 (1957), a California reviewing court could not reverse Henry's conviction on the basis of this claim unless *Henry* could demonstrate that it was *reasonably probable* that a result more favorable to him would have been reached absent admission of the Hackett testimony.[2]

In his federal habeas petition, Henry contended that he had been denied due process at trial because evidence of an uncharged crime was erroneously admitted (the Hackett testimony) and was then coupled with a jury instruction emphasizing that same evidence. Had Henry presented this federal claim to the state courts, he would have argued that the error had "so fatally infected the proceedings as to render them fundamentally unfair," *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991), such that it acquired federal due process dimensions and should be analyzed under the prejudice standard of *Chapman v. California*, 386 U.S. 18 (1967). *Chapman* would then have mandated reversal unless the *state* showed that the constitutional error was "harmless beyond a reasonable doubt." *Id.* at 24. Henry did not present, nor did the California courts of their own volition consider, such a federal claim.

[2]Parenthetically, there is nothing in *Watson* to suggest that its mention of "the constitutional requirements of a fair trial and due process" was anything other than a reference to the *state* constitution's guarantees. *Watson*, 46 Cal. 2d at 835. *See Cal. Const.* Art. I, § 15 (fair trial and due process guarantees in criminal cases). The California Supreme Court in *Watson* cited only its own precedents in support of this reference. 46 Cal. 2d at 835-36.

The California courts would thus have applied a markedly different prejudice standard to Henry's claim had they considered it as a federal due process challenge. Instead of the state-law *Watson* reasoning the California courts actually used, they would have applied the federal *Chapman* standard (not *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993), as the majority asserts[3]), and the state and not Henry would have carried the burden regarding a prejudice showing. The *Chapman* analysis would have been more favorable to Henry, thus giving the state a greater opportunity to correct its own mistake.

Under *Anderson*, the exhaustion requirement mandates that the substance of a federal claim be asserted with *particularity* in the state court. *Anderson*, 459 U.S. at 7. Henry's citing of a state court decision predicated on state law (e.g., *Watson*) does not apprise the state reviewing court of a potential federal claim. *Id.* at 7 n.3. While this case is at least as close as *Anderson*, under these principles the difference between the *Watson* and *Chapman* standards dictates the conclusion that Henry failed to exhaust his federal claim in state court, even if one accepts the majority's equation of "miscarriage of justice" with "fundamental[ ] unfair[ness]." To the extent the majority employs the *Tamapua* standard of "essentially the same argument" to find exhaustion, it distorts the required analysis into a semantic exercise, allowing federal courts to construe and consider federal claims that were never fairly presented to or considered by — and thus never exhausted in — the state courts. *Picard*, 404 U.S. at 276; *Anderson*, 454 U.S. at 7.

[3]The majority attempts, without visible support, to skate over this defect in its analysis. It is irrelevant that *if* Henry had exhausted his federal claim in state court a federal habeas court might have employed the *Brecht* standard in evaluating the collateral attack.

A review of the record confirms that the California courts were not apprised of Henry's federal claim.

III

I have examined the entire state-court record available to us in this case. Henry's written materials cited only provisions of the California Constitution, California statutes, and California state case law. At trial, his counsel did not mention other sources of authority.

Henry never suggested that the trial court's admission of the testimony at issue violated due process or any other federal right. Henry's only invocations of due process and "constitutional" rights (which may or may not have signaled a federal, as opposed to state, constitutional claim) occurred in relation to a different alleged defect of the trial having to do with the specificity of the charge upon which Henry was convicted, a matter which he has not pursued on appeal.

A. *The State Trial Court.* The trial court based its decision to admit the testimony upon California state-law cases interpreting the California Evidence Code that held admissible, in a trial on a given charge, evidence of the defendant's similar prior explanations regarding similar previous allegations against him. The trial court additionally considered *Cal. Evid. Code* § 352 (inadmissibility because of prejudicial effect requires excess of prejudice over probative value) and found the testimony admissible. The limiting instruction came from the same cases as well as California model instructions.

Henry's counterarguments focused on rebutting the state's use of the California state-law cases and asserted that other California state-law cases precluded the evidence. He reargued the same ground during the court's consideration of his motion for a new trial.

Thus, at no time during proceedings in the state trial court did Henry argue that admission of the Hackett testimony was

anything more than an error under the California Evidence Code and California cases interpreting *state* law.

B. *Appellate Proceedings.* Henry's Opening Brief for the California Court of Appeal made "essentially similar" arguments with respect to this aspect of the trial. He argued that the testimony was inadmissible as both hearsay and propensity act evidence. Henry continued to challenge the authority of the state-law cases upon which the trial court had relied, and contended that the prejudicial effect of the testimony had outweighed the probative value. Further, Henry claimed that the state had improperly withheld the evidence until the end of the case, citing various state-law cases holding that such conduct could render the evidence inadmissible.

Henry's brief concluded that the alleged error had been highly prejudicial and that (as Art. VI, § 13 of the California Constitution required him to plead) the error had resulted in a "miscarriage of justice." He cited *People v. Watson* for the test regarding prejudicial effect. Henry's Reply Brief covered no new ground.

Although we have no transcript of the argument in the Court of Appeal, that court's decision demonstrates that the court was unaware of any claims based upon federal law. The court found that the trial court had erred in admitting the testimony, but did not find prejudice to Henry: "we cannot say the result would probably have been different had the evidence not been adduced at the end of trial." This standard comes from California's own *Watson* test which, as we know, differs from the federal *Chapman* standard the court would properly have applied to an error of federal law. One judge dissented on the basis that the majority's *Watson* assessment was simply wrong, but suggested no new sources of law. The opinion does demonstrate that the California courts actually decided a claim of miscarriage of justice.

C. *Petition for Review in the California Supreme Court.* Henry's Petition for Review in the California Supreme Court

returned to the miscarriage of justice argument with respect to the challenged testimony. Henry contended that admission of the Hackett testimony was "reversible error under Article VI, Section [13] of the Constitution and Evidence Code § 353(b)." He contested the Court of Appeal's *Watson* analysis of prejudice, and asked the state Supreme Court to clarify the *Watson* standard, but Henry did not suggest that use of *Watson* was in any sense a federal constitutional error.

I have also reviewed each of the California decisions Henry cited, and none of them refers to federal constitutional provisions, federal statutes, or federal decisions in any manner which should have apprised the state courts of Henry's federal claim.

Conclusion

In sum, Henry never indicated to the California courts any federal basis for his claim of error with respect to the testimony at issue, and he certainly did not argue for application of standards that were more than "somewhat similar" to the controlling federal legal principles. Each and every one of his arguments depended upon California sources of law and challenged the method of application, but never the underlying exclusive applicability, of those sources.

I conclude that Henry did not exhaust his state remedies and that this court should not have considered Henry's federal due process claim on the merits.

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APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT E. HENRY,	)	CV 90-4064-RMT(K)
	)	
Petitioner,	)	FINDINGS ON A
	)	PETITION FOR A WRIT
v.	)	OF HABEAS CORPUS
	)	ON A PERSON IN
WAYNE ESTELLE,	)	STATE CUSTODY
Warden,	)	
	)	**Filed - May 8, 1991**
Defendant and Appellant.	)	**Clerk, U.S. District Court**

These Findings are submitted to the United States District Judge pursuant to the provisions of 28 U.S.C., 636 and General Order 194 of the United States District Court for the Central District of California.

On August 1, 1990, petitioner, a state prisoner at San Luis Obispo, filed this petition for a writ of habeas corpus by counsel, paying the fees. The Magistrate Judge called for a response, which was filed on August 30. Petitioner filed his traverse on September 7, and additional authorities were subsequently filed by each side. Oral argument was heard on December 14, and after the submission of a post-hearing memorandum, the matter was submitted.

The Magistrate Judge has read and considered all of the pleadings, relevant exhibits, and oral argument and makes the following findings.

Petitioner was charged with seven counts of child molestation. After a jury trial in the Superior Court of the State of California for the County of Ventura, petitioner was convicted of one count involving a boy named Andrew. (C.T. 1, 2, 169) As to the additional counts, which involved another boy, petitioner was acquitted of one, and a mistrial was declared as to the other five. On November 29, 1988, petitioner was sentenced to six years in prison. (C.T. 205)

In its opinion, the Court of Appeal determined that evidence of a prior uncharged crime was erroneously admitted, but that it was harmless error. (Petn. Ex. A)[1/] The California Supreme Court denied review.

Petitioner contends that he was denied due process at trial because evidence of an uncharged crime was erroneously admitted, and was then coupled with a jury

---

1. It was held that since there was no evidence that petitioner's prior statement was false, "it had no probative value at all" but "only prejudicial value." It was further held that the accompanying jury instruction "required the jury to focus on the prior accusation to determine whether [petitioners] present denial was not true [and] virtually required the inference the first part of the instruction appears to forbid." (Pet. Ex. A, p. 27) This decision applied California Evidence Code 1101(a). Such evidence would also be inadmissable under Fed.Evid.C. 404.

instruction emphasizing that same evidence. He further alleges a violation of due process in that the prosecution failed to advise him of the date and time of the offense, thereby precluding a reasonable opportunity to prepare and present his defense. Respondent argues that petitioner has not exhausted his state remedies because he failed to raise the issue of due process in the state court proceedings.

Under the facts of this case, petitioner is correct in his allegation that the improperly admitted evidence coupled with the jury instruction violated the due process clause of the Fourteenth Amendment. Because the California Court of Appeal has already determined that admission of the subject testimony was error, we consider whether the error was of such magnitude as to deny petitioner a fundamentally fair trial. Gordon v. Duran, 895 F.2d 610, 613 (9th Cir. 1990).

The record reveals that at the time of the alleged crimes, petitioner was the rector of St. Paul's Episcopal Church and dean of St. Paul's Parish Day School in Ventura, California. Both alleged victims testified at trial. Andrew, age ten at the time of trial, testified that the alleged act occurred sometime during his school year (R.T. 380-381) Michael, age fourteen at the time of trial, testified that he was ten or eleven when the alleged acts occurred. The only corroboration of their testimony was a statement by the school principal that she had seen Andrew waiting outside petitioner's office on one occasion during his kindergarten year, and that she saw petitioner take Andrew into his office and close the door. A local couple, the Yehs, testified that they heard

rumors that petitioner had molested Andrew; (R.T. 398, 407) they testified that they confronted petitioner with the allegation, which he denied, but he admitted that something had happened which was "matter of interpretation." (R.T. 402, 429-430)

After the defense had rested, the prosecution was allowed to reopen their case to offer testimony relating to a prior uncharged allegation of child molestation. A witness (Hackett) testified that twenty years earlier his son had accused petitioner of "touching" him. (R.T. 743-745) Petitioner had denied the allegation, telling Hackett that he had only counseled his son regarding a nervous habit of grabbing himself. (R.T. 745-748) The trial court instructed the jury as follows prior to the taking of this testimony and at the completion of all of the evidence:

> Evidence has been introduced for the purpose of suggesting that the defendant may have offered an explanation for [an] occurrence other than that for which he is on trial.
>
> Such evidence, if believed, was not received and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit such acts. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show that the defendant's present out-of-court explanation, if you find that it was made, or his conduct, is not genuine.

> When a defendant uses a similar explanation of his conduct on more than one occasion, his prior statements may, if found to have been made, show that his present explanation, if found to have been made, is not genuine. (R.T. 742, 896-897; C.T. 138)

The extreme prejudice of the Hackett testimony is clear when viewed in the context of petitioner's entire trial. Evidence of prior uncharged crimes is generally considered to have considerable potential for creating prejudice for criminal defendants. McGuire v. Estelle, 902 F.2d 749, 755 (9th Cir. 1990). The unproven allegation that petitioner had molested a child twenty years previously and the resulting unavoidable inference that he had continued in his position of trust to gain opportunity to continue such acts compounded the emotionally charged atmosphere present in any child abuse prosecution and could not be overlooked by the jury. There was absolutely no proof that petitioner had committed the uncharged act. It was remote in time and it was not introduced to prove any material issue in the case. United State v. Hadley, No. 89-10428. Slip Op. at 13997 (9th Cir. Nov. 14, 1990). The dramatic timing of the hackett testimony, after the defense had rested, magnified the prejudice. The jury instruction given twice, as much as told the jurors that they could presuppose that petitioner's explanation to Hackett was false, and therefore his similar statement to the Yehs was most likely false. There is no way this could be harmless error.

Respondent incorrectly contends that petitioner has not exhausted his state remedies because he argued violations of state law without specifically raising the spectre of due process. In both the California Court of Appeal and the California Supreme Court, petitioner raised the issues of the erroneous admission of the Hackett testimony, the improper jury instruction, and the failure to advise him of the time of the alleged act. These are the identical issues he raises in the instant petition. Although petitioner did not specifically invoke due process in his state arguments, he impliedly raised the issue by arguing that the testimony and jury instruction were "obviously prejudicial," "highly inflammatory," (Petition, Ex. B, p. 68) and that "trial was contaminated." (Ex. E, p. 121)

The exhaustion requirement is satisfied once a claim is fairly presented to the highest state court. Picard v. Connor, 404 U.S. 270, 276 (1971). Petitioner has adequately exhausted the substance of his federal claim. See Tampua v. Shimoda, 796 F.2d 261, 262 (9th Cir. 1986). Petitioner should not be denied access to the federal courts simply because he failed to cite "book and verse on the federal constitution." Daugharty v. Gladden, 257 F.2d 750, 758 (9th Cir. 1958), quoted with approval in Picard, 404 U.S. at 278. In concluding that the admission of the subject testimony was "harmless error" and that no miscarriage of justice occurred, the California courts in effect made a finding that petitioner received due process and the trial remained fundamentally fair even with the admission of this evidence. Considering the same evidence and the same

error, we are of the opinion that petitioner's trial was fundamentally unfair.

We find that petitioner has exhausted his state remedies and that the Hackett testimony was so inflammatory as to infect the entire trial and preclude fundamental fairness. McGuire, 902 F.2d 749. Therefore, petitioner is entitled to a writ of habeas corpus from this Court, pursuant to 28 U.S.C. 2243, and the case should be remanded to the state court for retrial. We do not reach the question of whether the prosecution's failure to advise petitioner of the time of the offense further denied him due process.

IT IS THEREFORE RECOMMENDED that the Court enter an order granting the petition and remanding the case for a new trial or the release of petitioner.

DATED: This 6th day of May, 1991.

JOHN R. KRONENBERG
United States Magistrate Judge

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT E. HENRY,	)	CV 90-4064-RMT(K)
	)	
Petitioner,	)	JUDGMENT
	)	
v.	)	**Filed - May 20, 1991**
	)	**Clerk, U.S. District Court**
WAYNE ESTELLE,	)	
Warden,	)	THIS CONSTITUTES
	)	NOTICE OF ENTRY AS
Respondent(s).	)	REQUIRED BY FRCP,
		RULE 77(d).

IT IS ORDERED, ADJUDGED AND DECREED that the petition is granted; the case is remanded for release of the petitioner, unless a new trial is commenced ~~conducted~~ within sixty (60) days of the filing of this judgment.

Dated: 5/20/91

ROBERT M. TAKASUGI

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT E. HENRY,	)	CV 90-4064-RMT(K)
	)	
Petitioner,	)	ORDER
	)	
v.	)	Filed - May 20, 1991
	)	Clerk, U.S. District Court
WAYNE ESTELLE,	)	
Warden,	)	
	)	
Respondent(s).	)	

Pursuant to 28 U.S.C., 636, the Court has reviewed the record, the pleadings, the findings of the United State Magistrate, and the objections and concurs with the adopts those findings.

Each party will bear its own costs.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve a copy of the Judgment, of this Order and of the findings of the United States Magistrate by United States mail upon counsel of record for both parties.

DATED: This 20 day of May, 1991.

ROBERT M. TAKASUGI
United States District Judge

APPENDIX D

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,	)	2nd Crim. No. B038745
	)	(Super. Ct. No. CR23041)
Plaintiff and Respondent,	)	(Ventura County)
	)	
v.	)	Filed - Feb. 6, 1990
	)	
ROBERT HENRY,	)	
	)	
Defendant and Appellant.	)	
	)	

Appellant was convicted of one count of child molestation (Pen. Code, § 288, subd. (a))[1/] and sentenced to state prison. We find merit in his

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1. Appellant was charged with six other counts all relating to one other child. The jury acquitted him of one count and were unable to reach a verdict on the others as to which a mistrial was declared.

earlier accusation of a similar offense. We find the error was not prejudicial. We find no merit in the claim appellant was denied due process because of the victim's inability to specify the date of the offense and affirm.

The prosecution was permitted over defense objection to reopen its case in chief and to call a witness after the defense rested to elicit testimony as follows: The witness, Mr. Hackett, testified that 20 years ago his son, then 11 years old, had told him that appellant, then the rector of his church, had "touched" him. Shortly after this Hackett confronted appellant with his son's accusation. Appellant denied it and said that the son was mistaken; he had only counseled the son about grabbing his own penis when he was nervous.

Immediately before this testimony the court advised the jury as follows: "Evidence [is being] introduced for the purpose of suggesting that the defendant may have offered an explanation for occurrence [sic] other than that for which he is on trial. [¶] Such evidence, if believed, [is] received and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit such acts. [¶] Such evidence . . . may be considered by you only for the limited purpose of determining if it tends to show that the defendant's present out-of-court explanation, if you find that it was made, of his conduct, is not genuine."

The court had, prior to trial, denied the prosecution's motion to admit this evidence as well as other evidence of earlier molestations of young men not charged in the complaint. Based on appellant's

representation intent was not at issue, it ruled it was all inadmissible during the People's case in chief. It otherwise reserved ruling as to admissibility.

During the trial the prosecution was permitted to elicit testimony from Doctor and Mrs. Yeh as follows. They had heard rumors appellant had molested Andrew W., the child in this case. They confronted him with this accusation. He denied it. When they asked him if anything had happened with the boy, he acknowledged it had but said it was a matter of interpretation.

The People's case relating to this charge otherwise consisted of the child's testimony regarding a single incident of appellant masturbating the child in appellant's office and evidence corroborative of that testimony. The child testified the incident occurred sometime while he was attending the church's school from kindergarten through the second grade. Other evidence was admitted indicating the child had once been called into appellant's office during his kindergarten year. The information, as amended, charged the offense occurred between September 1983 and June of 1986.

Appellant's contention the court erred in admitting the Hackett testimony over his objection on grounds of prejudice (Evid. Code, § 352) has merit. Primary reliance on the issue of admissibility was on People v. Kimble (1988) 44 Cal.3d 480,[2/] which is not

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2. In fairness to the trial court, the ruling was also based on an Appellate Court case which was final and published but subsequently belatedly decertified for publication by the Supreme Court. (See People v.

applicable here. There the trial court admitted over defense objections Kimble's denials and exculpatory statements made to the police. Evidence had also been introduced from which the jury could conclude the exculpatory statements were false.

The only contention in Kimble was that defendant's exculpatory statements could only be used to show consciousness of guilt if their falsity was proved by the defendant's own conflicting statement. The court held that any false statement which demonstrates consciousness of guilt was admissible regardless whether the falsity is proved by the maker's contrary statement or by extrinsic evidence.

Here, as noted by appellant, there was no evidence to show the statement purportedly made by appellant to Hackett was false. The only way the denial or the accompanying exculpatory explanatory statement would be probative at all is if it showed consciousness of guilt. To do this, the earlier statement would have to be shown to be false. Even if the statement was false its only probative value is based on predisposition to lie, i.e., he denied doing this before and his denial was false; therefore the present denial is false. This inference is forbidden by Evidence Code section 1101 subdivision (a) even as an intermediate link in the chain of reasoning to prove some fact permitted under section 1101 subdivision

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Newman, March 1988 formerly numbered 200 Cal.App.3d 1097, ordered not to be published October 13, 1988.)

(b). (People v. Thompson (1980) 27 Cal.3d 303, 321.) Since both People v. Moody (1976) 59 Cal.App.3d 357 and People v. Ricketts (1970) 7 Cal.App.3d 441 depend on these forbidden inferences they have been impliedly overruled by Thompson.

If appellant's statement to Hackett was true it would infer that someone falsely accused appellant of child molestation 20 years ago. This evidence had no tendency in reason to prove the present victim's unrelated accusation is also false. Therefore, without evidence from which the jury could determine the statement to Hackett was false it had no probative value at all.[3/] Therefore it had only prejudicial value -- that of showing appellant had committed a similar act, against a different young man. The probative inference that since he did it before so he probably did it here is prohibited by Evidence Code section 1101, subdivision (a) (People v. Tassell (1984) 36 Cal.3d 77, 85.)

The instruction given to the jury, while advising them the former accusation and denial cannot be used to show appellant has bad character or a disposition to commit such acts but only to determine whether his out-of-court explanation of his conduct is genuine, of necessity required the jury to focus on the

---

3. In the prosecution's written offer of proof prior to trial on its motion to admit uncharged offenses it had stated that if called to testify Mr. Hackett's son would state that appellant had molested him. No further reference to this proffered testimony was made and the son was not called as a witness.

prior accusation to determine whether his present denial was not true. The only way such a determination could be made is to assume the earlier accusation was true. The instruction virtually requires the inference the first part of the instruction appears to forbid. It was error to admit the testimony of Hackett.

We find the error was not prejudicial. It is not reasonably probable a different result would have been reached in the absence of the admission of this evidence.

While evidence of other crimes is inherently inflammatory (People v. Ogunmola (1985) 39 Cal.3d 120, 124, it is less so here. Evidence was properly received on six similar charged offenses involving a different victim. Therefore, if jurors were to be prejudiced against appellant it was from that more specific testimony that bias may have arisen. The fact the jurors unanimously acquitted appellant on one of these counts and deadlocked in various combinations on the others indicates they continued to evaluate the evidence without being swayed by prejudice.

Appellant argues it was an abuse of discretion to permit the People to reopen their case to obtain Hackett's testimony after both sides had rested. While the court had reserved ruling on the admissibility of this evidence except to preclude it on the People's case in chief, nothing presented in the appellant's defense made it any more probative than it was before trial commenced.

As predicted the defense did not challenge intent; the complete focus was to raise a reasonable

doubt that the touching incidents described by the two boys had happened. The defense theory of the case was that the victim on the six counts was deliberately lying and Andrew W., the victim here, was mistaken or fantasizing. Evidence was presented from which the jury could infer the testimony of the Yehs regarding the accusation to and the denial and admission of appellant was a recent fabrication. Therefore the Hackett testimony was not proper rebuttal. To have such evidence admitted after the defense rested further magnified this other crimes evidence. (People v. Thompson, supra, 27 Cal.3d 303, 330.)

However, no objection was made on this ground. While it is now claimed the court abused its discretion in permitting the prosecution to reopen to admit this evidence, this objection was not made at trial. Consequently it is unnecessary to determine whether the errors, if any, were prejudicial. (Evid. Code, § 353.)

Even were we to consider the claims of improper rebuttal or an abuse of discretion in permitting the prosecution to reopen, any discussion of prejudice would simply reiterate that addressed above in finding the evidence erroneously admitted. While the timing may have had a tendency to magnify the importance of the evidence, we cannot say the result would probably have differed had the evidence not been adduced at the end of trial. Counsel effectively cross-examined Mr. Hackett regarding his conflicting recollections about the matter and the length of time since the purported conversation was held.

The victim's testimony about appellant's masturbating him was sufficient, if believed, to adequately support the charged offense. Since the claimed errors did not relate to the credibility of the victim, the only real issue on this count, we find any error harmless.

Appellant's final contention is that he was denied due process because of the uncertainty in both pleading and proof of the time the offense occurred and therefore it was error to deny his demurrer and motion for new trial on this ground. We find no merit in this contention.

We recognize there is some split of authority on whether uncertainty in the pleading or proof as to the date of the offense deprives appellant of an opportunity to present a alibi defense in various contexts. (Compare People v. Van Hoek (1988) 200 Cal.App.3d 811, 816-817 with People v. Obremski (1989) 207 Cal.App.3d 1346.)

There is not now, nor has there ever been, a rule requiring either pleading or proof of a discrete minute or hour, day or month when a criminal act occurred. For pleading purposes it has always been sufficient to allege a period prior to filing and within the statute of limitations. (Pen. code, § 955; People v. Wrigley (1968) 69 Cal.2d 149, 155.) Nor is it essential to prove the precise date and time the offense occurred so long as it is proved to have occurred within the period of limitations. At least until Van Hoek and its progeny, so-called "alibi defense" cases have no different rule for pleading or proof. (Id.) It is only when the prosecution's proof specifies a definite time and an alibi

defense is actually presented that the standard instruction, i.e. that proof of the time of the offense is not essential (see CALJIC No. 4.71) becomes erroneous. (See People v. Jones (1973) 9 Cal.3d 546, 557.)

It involves rank speculation to say that appellant or any similarly situated defendant has been deprived of the opportunity to present an alibi defense because of the victim's failure to recollect the date or time of the offense. Without knowing when the offense occurred, appellant does not know whether he had an alibi defense for that time.

It is not the case that all persons who are advised of the precise date of the offense can present an alibi defense even if innocent of the charge. The victim knowingly or otherwise may specify a time of the criminal act when the accused was alone or surrounded by strangers, none of whom could testify to the accuseds presence even if they could be located months or years later.

The fallacy in the rationale underlying Van Hoek is that this uncertainty as to proof of the time of the offense is unique to child molestation cases. Prosecution of many serious crimes routinely involves the same uncertainty. Most burglaries occur while the residents or tenants are absent; that absence may be of short or long duration. Many homicides are committed without witnesses and under circumstances that the time of death cannot be determined with any precision. The fact a person may have had or proved an alibi if greater precision were shown in establishing the time of the offense certainly would not prohibit the prosecution of

those cases. An accused who has an alibi certainly has a constitutional right to present one in his own defense; no one however has a constitutional right to have the time of the offense established precisely on the off chance that, if it were, the accused could establish a defense.

The judgment is affirmed.

NOT TO BE PUBLISHED.

ABBE, J.

We concur:

STONE, P. J.

I respectfully dissent.

I agree with the majority that the Hackett testimony was improperly admitted under Evidence Code section 1101, subdivision (a), and People v. Thompson (1980) 27 Cal.3d 303, 321. Unlike the majority, however, I feel the jury's verdict reflects the strong influence of Hackett's testimony. I do not think it follows that because the jury acquitted appellant on the charges involving Michael it was therefore not prejudiced by Hackett's testimony as it related to Andrew. As appellant points out, the jury was instructed to consider the Hackett testimony as it pertained to the charge involving Andrew.

The verdict of guilty was to count 7. In my view, it was the weakest count. It involved a single incident with Andrew that occurred sometime during a period exceeding two years. Just before Andrew went into appellant's office, he was sitting with other children on the bench just outside the office. Other grownups were there, and his mother was about to pick him up. When he left appellant's office, there were one or two children on the bench. Andrew did not remember if the incident occurred when he was in kindergarten or in the first grade. He did not remember who his teacher was at that time, and he did not know whether he had ever been in appellant's office alone on any other occasion. These facts alone, of course, do not mean the offense did not occur, but in comparison with the facts relating to other counts, they are weaker. For example, Michael's testimony seems much stronger. He was older, more articulate, and testified in detail to six incidents rather than one.

It is true we do not have the advantage of observing the demeanor of the witnesses, and the jury may have disbelieved Michael and believed Andrew. But, the hearsay testimony that Hackett offered concerning an alleged incident that occurred 20 years earlier was a way of telling the jury that appellant lied then just as he is lying today. Considering that this testimony was also given after the defense had rested, it made a lasting and sustaining impression on the jurors' minds. I am not convinced that it is reasonably probable the same result would have been reached absent the error. (See People v. Watson (1956) 46 Cal.2d 818, 835-836.) I would reverse.

NOT TO BE PUBLISHED.

GILBERT, J.

Kenneth R. Yegan, Judge
Superior Court County of Ventura

Dennis A. Fischer, under appointment by the Court of Appeal, for Defendant and Appellant.

John Van de Kamp, Attorney General; Richard B. Iglehart, Chief Assistant Attorney General; Edward T. Fogel, Jr., Senior Assistant Attorney General; Mark Alan Hart, Supervising Deputy Attorney General; Alison Braun, Deputy Attorney General, for Plaintiff and Respondent.

(2)

No. 94-941

In The

Supreme Court of the United States

October Term, 1994

WILLIAM DUNCAN, Warden,

Petitioner,

v.

ROBERT E. HENRY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a habeas corpus petitioner, who claims that the state court proceedings that led to his conviction violated his federal due process rights, has satisfied the exhaustion requirement of 28 U.S.C. § 2254 as interpreted by *Anderson v. Harless*, 459 U.S. 4 (1982), where the contentions he presented to the state court as constituting a miscarriage of justice under Article VI, Section 4½ of the California Constitution were the same as those he asserts in his habeas petition as constituting a federal due process violation and where the test for a miscarriage of justice under the state constitution is the same as the test for the federal due process violation.

2. Whether the Ninth Circuit was correct in holding that the federal due process rights of an accused are violated by admission of evidence that has no probative value and which is of such quality as necessarily prevents a fair trial, and if so, whether the court correctly applied this rule to the facts of this case.

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In The

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ROBERT E. HENRY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Robert E. Henry respectfully submits that the Petition for Writ of Certiorari (hereafter the "Petition") should be denied for the reasons stated below. Respondent Henry adopts the Petition's statement regarding the Opinion Below, Jurisdiction and Statutory Provision.

STATEMENT OF THE CASE

To avoid confusion we refer to petitioner Duncan as the State and to Respondent Henry (the habeas petitioner) as Henry.

The statement of the case in the Petition leaves out evidence that drew into question the testimony of Andrew and fails to mention circumstances that increased the prejudicial effect of the Hackett testimony, most of which appears in the opinion of the Ninth Circuit (Appendix A, hereinafter the "Opinion") and is fully supported by the record. At the time that the molestation is alleged to have occurred, Andrew's parents were late and could arrive in any moment; the area outside Henry's office was bustling with people; and students passing by the window of Henry's office could see in through the drapes. [Opinion, pp. 9455 and 9462; RT 460(27)-464(6); 490(12)-491(13); 459(15-27); 480(19-28)]. The State was allowed to reopen its case in chief to present Hackett as the last witness, and the prosecutor emphasized his testimony in his closing argument. [Opinion, pp. 9455, 9463; RT 703(28), 704(28)-707(3)].

The Petition at page 4 says that Mrs. Ryan "concluded that the incident occurred in 1985." If the State means to imply that Mrs. Ryan testified to molestation, that is not so. She did not testify to having any knowledge of what occurred after Andrew entered Henry's office. Presumably the State means that if Andrew's testimony is believed, the incident to which he testified

occurred in 1985. [RT 465(25)-467(13)]. Finally, the Petition says, "Timothy's own account indicated that petitioner had molested him." (Petition, p. 5). Timothy did not testify. This is what Hackett said.

The Petition omits reference to the instruction the trial court gave respecting the Hackett testimony, which exacerbated the prejudice caused by the admission of the testimony. [Opinion pp. 9456-7, 9463-4; RT 896(12)-897(20)]. That instruction was in part as follows:

> "Such evidence was received and may be considered by you for the limited purpose of determining if it tends to show that the defendant's present out-of-court explanation (to the Yehs), if you find that it was made, of his conduct, is not genuine.
>
> When a defendant uses a similar explanation of his conduct on more than one occasion, his prior statements may, if found to have been made, show that his present explanation, if found to have been made, is not genuine."

Finally, the Petition recites much detail about the Yehs' testimony (Petition, pp. 4-5) that is not in the Opinion, but leaves out evidence that casts real doubt on that testimony. After their alleged conversation with Henry, both Dr. Yeh and Mrs. Yeh talked to many people in the community, including the archdeacon and the bishop of the diocese and the senior and junior warden of the church, about the accusations against Henry, but they never once mentioned their alleged conversation with him until they met with an investigator for the District Attorney's office more than one year later. [RT 408(13)-410(8); 418(22)-419(5); 435(11)-437(8);

442(23)-445(7); 696(10)-697(19)]. This was the same investigator who "interviewed" little Andrew five times concerning the testimony he would give in court [RT 684(13)-685(11)].

REASONS FOR DENYING THE PETITION

INTRODUCTION

1.

The Ninth Circuit's reasoning is entirely consistent with *Anderson v. Harless,* 459 U.S. 4 (1982). There is no question that the facts upon which the federal claim is based were before the state court. The State only questions whether the "substance" of the federal claim was presented. The Ninth Circuit correctly held that it was. The issue that was presented to and decided by the state court was identical to the issue that was presented to and decided by the federal court on Henry's petition. The state court had the opportunity to decide that issue and did so adversely to Henry. The District Court and the Ninth Circuit decided the same issue in Henry's favor. The decision does not, as the State suggests, allow state prisoners to by-pass state courts.

2.

The Ninth Circuit did not, as the Petition suggests, rule that state law error affecting trial result is a due process violation. It ruled that a federal due process violation occurred here because the evidence in question had no probative value, necessarily prevented a fair trial

and had a substantial and injurious effect or influence on the jury. This is clearly the test for determining whether admission of evidence constitutes a federal due process violation and depends in no way on whether admission of the evidence was a state law error.

3.

The Ninth Circuit correctly held that the test was met. In doing so it nowhere suggests that "evidence that tends to prove a material fact" can be a due process violation (Petition p. 9). It reasoned that the evidence had no such tendency and was highly prejudicial.

4.

The Questions Presented in the Petition suggest that this case raises some issue under *Teague v. Lane,* 489 U.S. 288 (1989), but the Petition does not develop the issue anywhere. In any case, there is no *Teague v. Lane* issue here.

ARGUMENT

A. THE NINTH CIRCUIT APPLIED THE ACCEPTED TEST AS TO WHEN ADMISSION OF EVIDENCE VIOLATES DUE PROCESS AND CORRECTLY FOUND THAT IT WAS MET IN THIS CASE.

The Ninth Circuit followed the rule that is generally accepted in the circuit and elsewhere on this issue – a due process violation occurred if the evidence in question had

no probative value, a fact the state court acknowledged, and if it was "of such (inflammatory) quality as necessarily prevents a fair trial" (Opinion, p. 9461), citing *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991). This is in accord with *Moore v. Illinois*, 408 U.S. 786, 800 (1972), which holds that whether admission of evidence is a due process violation depends upon weighing the relevance of the evidence against its inflammatory effect. Indeed, the State championed the very same rule in its opening brief in the Ninth Circuit, where it said that *Moore* has the following meaning (Supplemental Appendix, App. 21-22):

> "(D)ue process is violated by the admission of prosecution evidence that has no probative value, but is so prejudicial that it is reasonably probable that exclusion would have produced a more favorable verdict. . . . "

The Ninth Circuit's holding on this issue did not create a new rule in violation of *Teague v. Lane*, 489 U.S. 288 (1989), as the Petition (p. 22) contends. It simply applied existing precedent.

The State is also incorrect in arguing that the evidence in question was "logically relevant," and therefore the Ninth Circuit either misapplied the rule or made up a new one. The Hackett testimony was offered and admitted for the sole purpose of showing that when Henry denied the Yehs' accusations and explained them away, he must have been lying. The Hackett testimony could tend to prove this only if Henry's denial of and explanation in response to Hackett's accusation had been false, and that would have been so only if Henry had in fact

molested Hackett's son. There was no evidence that he had done so, and thus Hackett's testimony did not tend to prove anything at all. If Henry had not molested Hackett's son, his denial and exculpatory statement to Hackett was absolutely true, and the fact that he made the statement to Hackett would in no way draw in question the truth of his statement to the Yehs. The instruction concerning the Hackett testimony was particularly egregious. In essence it said:

> "Since Henry lied when he denied molesting Tim, you can infer that he lied when he denied molesting Andrew."

This was highly prejudicial as the Ninth Circuit observed (Opinion pp. 9462-3). Andrew's testimony was weak and was drawn into question by the surrounding circumstances. The *only* corroboration of Andrew was the testimony of the Yehs, and it was meaningless absent evidence that what Henry told them was a lie. There was no such evidence. The erroneous admission of Hackett's testimony and the erroneous instruction filled this vital gap. This enabled, indeed compelled, the jury to find that Henry lied to the Yehs when he denied their accusations and thus, in turn, lent credibility to Andrew's otherwise questionable testimony.

B. THE SUBSTANCE OF THE CLAIM HENRY PRESENTED ON HIS PETITION FOR WRIT OF HABEAS CORPUS WAS PRESENTED TO AND PASSED UPON BY THE STATE COURT, THEREBY SATISFYING *ANDERSON V. HARLESS*.

The state court held that the Hackett testimony had no probative value and should not have been admitted under state evidentiary law. It went on to hold, however, that the error was not cause for reversal because admission of the evidence, even in the light of the instruction that was given concerning it, was not "prejudicial." By this the court meant that in its view "it is not reasonably probable a different result would have been reached in the absence of the admission of this evidence." (Appendix D, p. 6.) Henry's habeas petition presented exactly the same issue to the federal court in two ways.

First, as we have shown in Section A above, to establish that the admission of the Hackett testimony was a due process violation, Henry had to show, in the State's own words, that it was "so prejudicial that it is reasonable probably that exclusion would have produced a more favorable verdict." This is the identical issue that was presented to and decided by the state appellate court. In the words of *Picard v. Connor*, 404 U.S. 270, 277 (1971), the "ultimate question for disposition" was "the same despite variations in the legal theory . . . . urged in its support."

This identity of issues surely satisfied *Anderson v. Harless*. The few analogous cases we have found agree. *West v. Wright*, 931 F.2d 262 (4th Cir. 1991), *reversed on other grounds*, ___ U.S. ___, 112 S. Ct. 2482 (1992); *Lesko v. Owens*, 881 F.2d 44, 50 (3d Cir. 1989), *cert. denied*, 493 U.S. 1036 (1990); *Osborne v. Wainwright*, 720 F.2d 1237 (11th Cir. 1983); *Daugharty v. Gladden*, 257 F.2d 750, 757-8 (9th Cir. 1958), *cited with approval in Picard v. Connor*, 404 U.S. 270, 278 (1971). These cases, like the case at bench, are in stark contrast to the facts in *Anderson v. Harless*, where the habeas petitioner had argued in state court that an instruction on malice permitted an inference that state law did not allow and then sought to argue on his habeas petition that the instruction relieved the prosecution of its burden to prove guilt beyond a reasonable doubt.

The State's argument (Petition pp. 17-18) about the effect of *Chapman v. California*, 386 U.S. 18 (1967), misses the point, even if *Chapman* were to apply to these proceedings (of which more later). A court does not get to the *Chapman* test until it has first found that a constitutional error has occurred. Where the claimed constitutional error is of the sort that is involved in this case, a finding that such an error did occur necessarily includes a finding that a different result would have probably been reached had the evidence been excluded. Once that finding has been made, there is no way that the error could be deemed harmless under *Chapman*, and so it becomes irrelevant. Thus, *Lesko v. Owens*, 881 F.2d 44, 49 n. 7 (3d Cir. 1989), says:

> "We note a certain overlap in analysis here, i.e., once there is a finding of a denial of a fair trial, it is difficult to envision such an error could be 'harmless.' We also note that not every court of appeals applies the harmless error analysis to this constitutional error." (citations omitted.)

In short, regardless of what *Chapman* may say, the habeas court had to decide the same issue that the state court decided.

For these reasons, *Chapman* has nothing to do with this case. This circumstance is unique to a case such as this one, where the court must examine and weigh all the evidence to determine if a constitutional error has been committed. In most cases this is not necessary. Thus in *Chapman* for example, the error lay in permitting the prosecution to comment on the silence of the accused. Having found that error to have occurred, the court then had to review all the evidence to determine if the error was prejudicial.

The second way in which the habeas petition presented to the federal court the same issue the state court decided arose under *Brecht v. Abrahamson*, ___ U.S. ___, 113 S. Ct. 1710 (1993). *Brecht* sets the standard for determining when a constitutional error, once found to exist, is reversible on collateral review. That standard is, again, the same as the standard the state court applied: whether the error "had substantial and injurious effect or influence in determining the jury's verdict." 113 S. Ct. at 1722.

The Questions Presented in the Petition suggest that reliance on *Brecht* runs afoul of *Teague v. Lane*, 489 U.S. 288 (1989). In fact, *Teague* supports the retroactive application of *Brecht* to this case. *Teague* said that the Supreme Court would not enunciate a new rule of criminal procedure on collateral review unless it could be made applicable to all persons similarly situated. 489 U.S. at 316. For that reason it declined to rule on the issue that the petitioner sought to present in that case. The *Brecht* Court, on

the other hand, chose to enunciate a rule. Therefore, under *Teague*, the Court must have assumed that the rule would be applicable to all similarly situated persons. In fact, the Supreme Court in *Brecht* did not believe it was enunciating a "new rule" at all. When the petitioner argued that the Court was bound by prior decisions that assumed *Chapman* applied on collateral review, the Court responded that "since we have never squarely addressed the issue . . . we are free to address the issue on merits." *Brecht*, 113 S. Ct. at 1718.

Finally, the vice that the *Teague* court sought to avoid was the adoption of new rules of procedure which, if retroactive, would open the door for innumerable prisoners, whose convictions were long since final, to come into federal court and seek release or new trial on the basis of the new rule. This, of course, could be true only with respect to new rules that enlarge the procedural rights of the accused. The *Brecht* rule does not have that effect; it narrows the procedural rights of the accused.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

December 12, 1994

Respectfully Submitted,

EVERETT B. CLARY
O'MELVENY & MYERS
Counsel for Respondents

SUPPLEMENTAL APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT E. HENRY, Petitioner and Appellee, v. WAYNE ESTELLE, Warden, Respondent and Appellant.	No. 91-55691 (USDC Central Dist. No. CV 90-4064-RMT(K) (Filed Aug. 8, 1991)

APPEAL FROM THE UNITED STATES DISTRICT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE ROBERT M. TAKASUGI

APPELLANT'S OPENING BRIEF

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UNITED STATES COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether a habeas corpus petitioner who is represented by counsel has fairly presented a federal constitutional claim to a state appellate court when he alleges a violation of state law, cites only state cases, invokes no constitutional principles and relies upon a state standard of harmless error reserved for non-constitutional claims.

2. Whether the admission of evidence, found to be error but harmless by a state appellate court, rendered petitioner's trial fundamentally unfair.

JURISDICTIONAL STATEMENT

Petitioner filed a petition for writ of habeas corpus in the United States District Court for the Central District of California pursuant to section 2254 of Title 28 of the United States Code. (ER. 119.)[1] On May 20, 1991, a judgment was entered granting the petition for writ of habeas corpus. (ER 231.) The notice of appeal was filed on June 13, 1991, qualifying the appeal as timely under Rule 4(a) of the Federal Rules of Appellate Procedure.

STATEMENT OF FACTS

A. Procedural Facts

Petitioner was charged with seven counts of child molestation. After a jury trial in the Superior Court of the State of California for the county of Ventura, petitioner was convicted of one count involving a boy named Andrew. (CT 1, 2, 169.) As to the additional counts, which involved another boy, petitioner was acquitted of one, and a mistrial was declared as to the other five. On November 29, 1988, petitioner was sentenced to six years in prison. (CT 205.)

Petitioner appealed his conviction to the California Court of Appeal. In its opinion, the Court of Appeal held that the trial court had erred under state law in admitting evidence of a prior accusation against petitioner, but found the error to be harmless. (ER 89-100.) Petitioner subsequently filed a petition for review in the California Supreme Court, which was denied. (ER 123.)

---

[1] "ER" refers to Excerpts of Record; "CT" refers to Clerk's Transcript; "RT" refers to Reporter's Transcript.

Petitioner then filed a petition for a writ of habeas corpus in the United States District Court for the Central District of California. (ER 119.) On May 10, 1991 a magistrate judge recommended granting the petition. By order filed May 20, 1991, the District Court adopted the magistrate judge's recommendation. (ER 230.)

B. Facts of the Criminal Offense

Andrew was ten years old at the time of his testimony. He was then in the fourth grade. (RT 378.)

Andrew attended kindergarten and first and second grade at St. Paul's Church and Day School where he met appellant, who was the rector of the church and dean of the school. Andrew remembered one time when he went inside petitioner's office, but he could not remember how old he was. (RT 380.) He was sitting on a bench in Mrs. Ryan's (the principal's) office waiting for his parents. (RT 380-381.)

Petitioner called Andrew into his office. Petitioner closed the door behind them. No one else was present. Petitioner told Andrew to lie down on the couch and pull down his pants. (RT 381-382.) Petitioner touched him on his penis. (RT 382.) Andrew thought that the rubbing lasted about three minutes. Petitioner told him to pull up his pants and go back to the bench outside his office to wait for his parents. (RT 384.) School, which ended at noon, was over for the day. (RT 391.)

Andrew was not angry and did not know what had happened to him. He did not know whether petitioner had done something bad to him. (RT 385.) He did not

know why he did not tell his parents. (RT 395-386.) Andrew loved petitioner because he was nice (RT 386.) He thought petitioner was close to God. (RT 387.)

Elizabeth Ryan was principal of St. Paul's for 17 years. (RT 456.) She testified to the layout of petitioner's office. There was a couch sofa under a window with drapes. Petitioner generally kept the drapes closed. (RT 462-464.) There was a walkway for the students that went by the windows. The first and second graders used one walkway and third and fourth graders used the other. (RT 479.) The drapes were a close, thick net, and they were not lined. (RT 480.) It was easier to see out of petitioner's office when the drapes were closed than it was to see in. (RT 510.) Ms. Ryan remembered that sometimes his office would become hot and stuffy, but she did not recall ever seeking the drapes or windows open. (RT 481.) The preschool students were released from school at 11:30 and grades one through eight got out at ten to three. (RT 485.) Sometimes the office area would be busy at the noon hour but at other times Ms. Ryan would be alone. (RT 490-491.)

Ms. Ryan remembered an incident where she came out of petitioner's office and saw Andrew sitting on the bench outside his door. Petitioner called Andrew into his office and closed the door behind him. (RT 466.) It was about 11:45 a.m. and Andrew was waiting to be picked up by his parents from kindergarten. She thus concluded that the incident occurred in 1985. (RT 467.)

Ms. Ryan saw Andrew go into petitioner's office with the door closed behind him on one other occasion, when Andrew was in first grade. On this occasion, Andrew had been sent out from his classroom because he was having

difficulties. Petitioner took Andrew, who had taken his books with him, into his office. (RT 468-469.)

Ms. Ryan became more acquainted with Andrew than with other kindergartners because he was having difficulty in school. Andrew was open with her and she never know [sic] him to tell a lie. (RT 470-471.)

Tomoko Yeh attended St. Paul's Episcopal Church in Ventura on a regular basis. Her husband was vestry and both her children attended the school. (RT 397.) In April 1987, Judy Thomas, wife of the police chief, told her that petitioner was believed to have molested Andrew. (RT 398, 407.)

When Mr. Yeh confronted petitioner on April 30th, he stated that something had happened, but that it was a matter of interpretation. He denied molesting Andrew. (RT 402.) Petitioner seldom looked at their faces during the meeting. He looked at the ground and seemed nervous. (RT 400.) Her husband kept a notebook of these events because he was [sic] medical doctor and he feared that a large problem might be developing. (RT 401.)

Ms. Yeh became concerned for the welfare of her children. She wanted to ask petitioner to keep his door open at all times to protect the children. (RT 401, 413.) Ms. Yeh began to cry during the interview since she felt uncomfortable because petitioner was unable to look at them. (RT 402-403.) Mr. Yeh told petitioner, " You should leave medical exams up to medical profession." (RT 403.) Petitioner said during the conversation that he had had problems with the Walker family 20 years ago in Pomona. (RT 414.)

Tobias Yeh called the principal Betsy Ryan, Father Nyback in Pomona and an archdeacon at the Episcopalian diocese when he heard the allegations against petitioner from his wife. (RT 425.) He prepared a notebook of the events, believing the incident to be a serious matter. (RT 426.) They met with petitioner to request that he keep his office door open at all times. (RT 428.)

Petitioner first denied that he had molested Andrew when Dr. Yeh confronted him but then stated, "something happened, but it's been misinterpreted." (RT 429-430.) Petitioner also told him that he was going to meet with Andrew's father, Steve Walker, to tell him some things that he did not know about. (RT 441-442.)

Thomas Hackett, now a resident of New Hampshire, lived in Pomona, California, from 1962 until 1972. (RT 743-744.) His son Timothy, now 30 years old, attended St. Paul's Episcopal day school in Pomona from the third to the sixth grade where petitioner was the rector. (RT 744-745.)

In 1969 Mr. Hackett's son told him that petitioner had touched him. When Mr. Hackett confronted petitioner, he stated that he had been counseling his son for an emotional problem which caused him to grab himself when nervous. (RT 745.) Petitioner intimated that Tim was grabbing his penis. Tim's account indicated that petitioner had molested him. Petitioner stated that Tim had been mistaken, and that petitioner had not touched him. (RT 746-748.)

STANDARD OF REVIEW

A district court's grant of a petition for a writ of habeas corpus is reviewed *de novo*. (*Carter v. McCarthy*, 806 F.2d 1373, 1375 (9th Cir. 1986); *Reiger v. Christensen*, 789 F.2d 1425, 1427 (9th Cir. 1986).) District court findings on questions of law and mixed questions of law and fact are reviewed de novo. (*Herd v. Kincheloe*, 800 F.2d 1526, 1528 (9th Cir. 1986).)

ARGUMENT

I.

PETITIONER DID NOT RAISE A CONSTITUTIONAL CLAIM IN STATE COURT PROCEEDINGS AND THEREFORE FAILED TO EXHAUST HIS STATE REMEDIES

The issue in the present case is whether a habeas corpus petitioner may be said to have exhausted state remedies within the meaning of 28 U.S.C. section 2254 when he alleges a claim of deprivation of due process on habeas review after not invoking due process, or *any* constitutional considerations, in arguing evidence was inadmissible in state court. Appellant submits that a mere claim of error under state law, such as what petitioner contended in this case in state court, clearly constituted a failure to exhaust under section 2254. Consequently, the district court erred in concluding that the exhaustion requirement had been satisfied. The district court's error requires reversal.

Before a federal court may address any constitutional issue on a writ of habeas corpus, and because "federal habeas corpus is an extraordinary remedy", the petitioner

must have exhausted all state remedies with respect to that issue. (28 U.S.C. §2254(b), (c), (1988); *McQuery v. Blodgett*, 924 F.2d 829 (9th Cir. 1991).) Section 2254 (b) specifically provides that a habeas application "shall not be granted" unless the petitioner has exhausted the remedies available in state court. "Courts have therefore consistently held that any constitutional claim must have been 'fairly presented to the state court'." (*Gonzalez v. Sullivan*, 934 F.2d 419, *Pickard v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971).) Because exhaustion is a prerequisite to a federal court's jurisdiction, it will even be addressed by the court *sua sponte* where the state has abandoned an exhaustion challenge (*McQueary* at p. 833, fn. 5.)

A petitioner has failed to exhaust his state remedies if he does not allege in state proceedings *the federal legal theory* on which his claim is based. (*Anderson v. Harless*, 459 U.S. 4, 6 (1982).)

As the United States Supreme Court stated in *Harless:*

> "In *Pickard v. Connor*, 404 U.S. 270 (1971), we made clear that 28 U.S.C. § 2254 requires a federal habeas petitioner to provide the state courts with a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim. *Id.*, at 276-277. It is not enough that all the facts necessary to support the federal claim were before the state courts, *Id.*, at 277, or that a somewhat similar state-law claim was made. See, e.g., *Gayle v. LeFevre*, 613 F.2d 21 (CA2 1980); *Paullet v. Howard*, 634 F.2d 117, 119-120 (CA3 1980); *Wilks v. Israel*, 627 F.2d 32, 37-38 (CA7), cert. denied, 449 U.S. 1086 (1980); *Conner v. Auger*, 595 F.2d 407, 413 (CA8),

> cert. denied, 444 U.S. 851 (1979). In addition, the habeas petitioner must have 'fairly presented' to the state courts the 'substance' of his federal habeas corpus claim. *Pickard, supra,* at 275, 277-278. Cf. *Ross v. Lundy,* 455 U.S. 509, 518 (1982)."

In the present case the petitioner, a state prisoner, filed an appeal in the California Court of Appeal following his conviction for child molestation. (ER 23.) Petitioner has been represented by private counsel at all times. (See *Gonzalez* at 423.)[2]

In his appeal to the California Court of Appeal petitioner claimed the trial court had erred under state law in admitting evidence of a prior accusation against him. This evidence consisted of the testimony of Thomas Hackett. (See pp. 6-7, *ante*.) Petitioner relied exclusively

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[2] While habeas petitions prepared by *pro se* litigants may be held to less stringent standards, formal pleadings drafted by lawyers are not. (*Boag v. MacDougall*, 454 U.S. 364, 365, 102 S.Ct. 700, 701, 70 L.Ed.2d 551 (1982) (per curiam); *Hughes v. Rowe*, 449 U.S. 5, 9, 101 S.Ct. 173, 175, 66, L.Ed.2d (1980); *Terranova v. Kincheloe*, 852 F.2d 424, 429 (9th Cir. 1988); *Eldrige v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987).) There is no justification in this case to construe petitioner's state court pleadings more liberally than petitioner presented them. Throughout state appellate and federal habeas proceedings petitioner has been represented by the law firm of O'Melveny and Myers. On his state appeal petitioner was represented by the O'Melveny firm in association with attorney Dennis Fischer. Mr. Fischer is the author of the California Continuing Education of the Bar's practice guide entitled "Appeals and Writs in Criminal Cases." (Copyright 1982 by the Regents of the University of California.) Last Term Mr. Fischer represented a habeas petitioner before the United States Supreme Court. (*Boyde v. California*, 494 U.S. ___, 108 L.Ed.2d 316, 110 S.Ct. 1190 (1990).)

on state cases and the state Constitution. He did not invoke the federal Constitution and argued only a violation of state law. (ER 39-45.) Specifically, he did not contend the alleged error in the admission of evidence was of constitutional dimension as a due process violation.[3] This much has been conceded by petitioner. (ER 139.)

On the contrary, petitioner specifically maintained that the applicable standard of prejudice was the test reserved for errors of state law that of *People v. Watson*, 46 Cal.2d 818, 835-836, 299 P.2d 243 (1956) *cert den.*, 355 U.S. 846, 78 S.Ct. 70 (1957); ER 53, 109.)

Petitioner thereby disavowed any claim of federal constitutional error, since such a claim requires the clearly established standard of *Chapman v. California*, 386 U.S. 18, 24, 875, S.Ct. 824, 828, 17 L.Ed 2d 205 (1967).

A crucial distinction between *Watson* and *Chapman* is that a finding of error under state law requires a state appellate court to decide only whether it is reasonably probable the result would have been different absent the error (*Watson*), whereas a finding of constitutional error requires a finding that the error was harmless beyond a reasonable doubt if the conviction is to be affirmed. (*Chapman.*)[4]

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[3] Compare *Terronova v. Kincheloe, supra,* 852 F.2d 424, 429 (9th Cir. 1988) [Petitioner, whose *pro se* petition was liberally construed, made at least passing reference to federal constitution].

[4] In *West v. Wright*, 931 F.2d 262, 265 (1991), the Fourth Circuit found that a habeas petitioner had exhausted a

Further, the two standards are *so* substantially *different* that when determining the appropriate standard of prejudice in a particular case the California Supreme Court invariably decides whether the standard is *Watson*, in which case the defendant bears the burden of proving probable prejudice rather than *Chapman*, which places the burden on the state to show the error was harmless beyond a reasonable doubt. (*See, e.g., People v. Brown*, 46 Cal.3d 432; 250 Cal.Rptr. 604, 758 P.2d 1135 (1988); *People v. Olde*, 45 Cal.3d 386, 414-415, 247 Cal.Rptr. 137, 754 P.2d 184 (1988); *People v. Lee*, 43 Cal.3d 666, 671-676, 238 Cal.Rptr. 406, 738 P.2d 752 (1987); Traynor, *the Riddle of Harmless Error* (1970).)

Petitioner's understanding and awareness of the significance of the differing standards of prejudice is evident since he phrased an unrelated contention in his state appeal as a violation "of his due process right." (ER 49-50.)

In affirming petitioner's conviction, the state appellate court applied the less stringent standard which petitioner proposed – *Watson* – and concluded the error was not prejudicial. (ER 95.)

It is not enough that petitioner now relies on the same factual allegations he made in state court; it is the sufficiency of petitioner's legal theory which has impermissibly changed.

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sufficiency of the evidence claim because, *inter alia*, his state court challenge was not "the 'more -likely - than-not" standard of rationality developed in the line of cases . . . rather than the more stringent 'beyond a reasonable doubt' standard for assessing the sufficiency of particular evidence. . . . "

"If, in state court, a petitioner has (1) cited a specific constitutional provision, (2) relied on federal constitutional precedent, or (3) claimed a determinate right that is constitutionally protected he will have employed a mechanism which significantly eases any doubt that the state courts have been alerted to the federal issues." (*Nadworny v. Fair*, 872 F.2d 1093, 1096 (1st Cir. 1989).) Petitioner did none of these things, the rubric of 'fair trial' being insufficiently specific to satisfy the exhaustion doctrine. (But cf. *Nix v. Whiteside*, 475 U.S. 157, 163, n. 3 (1986).)

"[W]e do not imply that [petitioner] could have raised the [due process] claim only by citing 'book and verse on the federal constitution.' " (*Pickard v. Connor, supra*, 404 U.S. at 278.) It is "the substance" of the federal claim that must first be presented to the state court, (*ibid*), and "in such a manner that it must have been likely to alert the court to the claim's federal nature." (*Nadworny v. Fair, supra*, 872 F.2d at 1097.)

"The appropriate focus, therefore, centers on the likelihood that the presentation in state court alerted that tribunal to the claim's federal quality and approximate contours. The inquiry, in our view, is foremost a question of probability." (*Id.* at 1098.)

In every court, petitioner has complained about the same evidence for the same reasons – too little relevance, too much prejudice. His theme has been that the evidence tended to prove his general criminal propensity rather than his actual guilt. In this important respect, petitioner's claims here and in the state courts may have been

"functionally identical."[5] (See *Nadworny v. Fair, supra,* 872 F.2d at 1099.) To presume that a "functionally identical" state claim would alert California jurists to its federal constitutional implications would be unfair to state judges and to state prisoners alike.

Nor can petitioner contend that the evidence in question by its nature implicated due process concerns even absent petitioner's explicitly invoking a due process claim. Admission in state criminal proceedings of evidence of prior conduct typically does not present a federal question. (*Cessasa v. Nelson,* 452 F.2d 1083, 1084-1085 (9th Cir. 1981).) Further, the harmless error analysis uti lized by the Ninth Circuit parallels *Watson* – error is harmless if it is more probable than not that the prejudice resulting from the error did not materially affect the verdict. (*United States v. Echavarria-Olarte,* 904 F.2d 1391, 1398 (9th Cir. 1990).)

In the presence of persuasive evidence that the state tribunal was misled as to the claim's federal character, speculation must yield to the comity interests underlying the exhaustion doctrine. The California court was only to find asserted state law evidentiary error harmless under a

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[5] Federal courts have condemned evidence of an accused's general predisposition toward crime, e.g., *United States v. Fox,* 473 F.2d 131, 134 (D.C. Cir. 1972), but this rule does not now enjoy constitutional status, *Spencer v. Texas,* 385 U.S. 554, 563-564 (1966); esp. 573-574 (Warren C.J. concurring/and dis.), and may not acquire such dignity in a federal habeas corpus case. (*Teague v. Lane,* 489 U.S. 288 (1989).) This tells nothing about whether "reasonable [state] jurists would likely have been alerted to the federal nature of the claim," however. (See *Nadworny v. Fair, supra,* 872 F.2d at 1103.)

standard more forgiving than that of *Chapman v. California, supra,* and any ambiguity in claiming federal error before the state court should be resolved against petitioner.

Despite the foregoing, the Magistrate Judge found that petitioner had "impliedly" exhausted his state remedies (ER 217), and the District Court adopted the Magistrate Judge's report and recommendation. (ER 230.)

In his report, the Magistrate Judge states that petitioner should not be denied habeas relief "simply because he failed to cite 'book and verse on the federal Constitution.' " (*Daugherty v. Gladden,* 257 F.2d 750, 758 (9th Cir. 1958); ER 217.)

Appellant submits the doctrine of exhaustion has advanced considerably since *Daugherty.* (See *Anderson v. Harless, supra; Pickard v. Connor, supra.*) More importantly, appellant submits it is hardly oppressive to require a habeas corpus petitioner who is represented by counsel to identify how an error of state law constituted a constitutional violation, particularly since admission in state criminal proceedings of prior conduct typically do not present a federal question. (*Cassasa v. Nelson, supra,* 452 F.2d 1083; see also *Petrucelli v. Coombe,* 735 F.2d 684, 689, ("Federal judges will not presume that state judges are clairvoyant.").)

In *Anderson v. Harless, supra,* the defendant had argued on his state appeal that the trial court's instructions on the element of malice was erroneous and he cited state law. "Not surprisingly, the Michigan Court of

Appeals interpreted respondent's claim as being predicated on state law . . . and analyzed it accordingly. . . . " (*Id.*)

The same is true in the present case. Petitioner relied on state law and, not surprisingly, the California Court of Appeal interpreted petitioner's claim as based on state law. The court found error under state law. Applying the appropriate standard of prejudice, the California Court of Appeal affirmed petitioner's conviction. (ER 95.)

In *Harless*, as here, the Court of Appeals (here the District Court) concluded the constitutional ramifications of the defendant's arguments were self evident and his reliance on state law "sufficient to present the state courts with the substance of his due process challenge. . . . " (*Id.*)

The Supreme Court in *Harless* noted "it is plain from the record that this constitutional argument was never presented to, or considered by, the Michigan Courts." (*Id.*)

The same is true here. While the due process ramifications of petitioner's claims may be apparent to the District Court, they were not shared by petitioner's counsel since they were never previously alleged, nor were due process ramifications apparent to the California Court of Appeal when it applied the standard of error reserved for violations of state law.[6]

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[6] In *McQueary v. Blodgett, supra*, 924 F.2d 529, 531, 533 and fns. 1 and 5, this court held that a habeas petitioner who challenged provisions of his sentence had adequately presented the underlying facts and the substance of his argument to the state courts. Appellant submits the same cannot be said for the instant case because a challenge to the admission of evidence must include an allegation of due process in order to trigger application of a federal-based standard of harmless error. Indeed, the *legal* premise of a *federal*-based claim is that asserted error is not harmless beyond a reasonable doubt.

The Magistrate Judge at least impliedly recognized merit in appellant's assertion. On November 15, 1990 the magistrate judge ordered oral argument in this case and argument was heard on December 14, 1990. During the argument, the magistrate judge expressly invited petitioner's counsel to file a petition for a writ of habeas corpus in the California Supreme Court, thereby precluding any claim by respondent that petitioner had failed to exhaust state remedies. (ER 195-196.) Petitioner declined to do so. Appellant submits the honorable magistrate judge's recommendation is a recognition of the reasonableness of appellant's assertion.

A review of the record in this case makes clear that a constitutional claim of deprivation of due process was never made to the California Court of Appeal, nor was such a claim evident from a review of petitioner's pleadings in state court. (*Cassasa v. Nelson, supra.*) On the contrary, petitioner presented an issue exactly as framed by his distinguished counsel; a claim of error under state law. Accordingly, the California Court of Appeal considered the issue as one of state law, not involving constitutional considerations.

As a result, the courts of California were never given a fair opportunity to review the merits of the federal legal theory which petitioner presented to the district court. Because petitioner did not raise the theory, the courts of

California were also never given the opportunity to apply the standard of prejudice reserved for constitutional claims.

Instead, petitioner presented a state law claim in state court and, unsuccessful there, he subsequently "federalized" his claim. Since he therefore failed to exhaust his state remedies, the petition should be dismissed and the district court's decision should be reversed.

II.

THERE WAS NO FEDERAL DUE PROCESS VIOLATION

Federal courts do not review state law errors. (*Engle v. Isaac*, 456 U.S. 107, 119 (1982); *Gryger v. Burke*, 334 U.S. 728, 731 (1948).) Thus, "failure to comply with the state's rules of evidence is neither a necessary nor a sufficient basis for granting habeas relief." A state prisoner nevertheless may be entitled to federal habeas relief if his trial was "so fundamentally unfair as to deny him due process." (*Donnelly v. DeCristoforo, supra*, 416 U.S. at 645.) The Supreme Court has cautioned that the Due Process Clause has "limited operation" and the "fundamental fairness" is "very narrowly" drawn.[7] (*Dowling v. United States*, 110 S.Ct. 668, 674 (1990).)

At the margins of "fundamental fairness," "constitutional line drawing . . . is necessarily imprecise." (*Donnelly v. DeCristoforo, supra*, 416 U.S. at 645.) Not

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[7] The Supreme Court may well elaborate this point in *McGuire v. Estelle*, 902 F.2d 749 (9th Cir. 1990), cert. granted, February 25, 1991, *Estelle v. McGuire* No. 90-1074.

surprisingly then, claims like petitioner's have produced many due process rubrics, but no rule. Guidance is found in *Moore v. Illinois*, 408 U.S. 786, however. In *Moore*, a fully loaded saw-off [sic] 16-gauge shotgun found in a car occupied by the defendant six months after the charged homicide was admitted into evidence over objection. The state conceded that the murder weapon was a 12-gauge shotgun, but the trial court admitted the 16-gauge weapon under a state rule permitting evidence of a weapon "suitable for the commission of the crime charged . . . even though there is no showing that it was the actual weapon used." (*Id.*, at 799.) The prosecutor argued to the jury that the 16-gauge shotgun, while not the murder weapon, did show that defendant was one of the "the kind of people that use shotguns." (*Ibid.*) In short, the State proved that the defendant was in constructive possession of an unlawful weapon that was designed to terrorize or kill people, but was not used in the crime charged. Lest the point escape the jury, the prosecutor made clear that the purpose of this evidence was to show the defendant's general propensity to commit crime.

In the United States Supreme Court, Moore insisted that he had been denied Fourteenth Amendment due process. The Court disagreed:

> "[W]e cannot say that the presentation of the shotgun was so irrelevant or so inflammatory that Moore was denied a fair trial. The case is not federally reversible on this ground." (*Id.*, at 800.)

Moore's holding may be explained on alternative grounds: (1) due process is violated by the admission of

prosecution evidence that has no probative value, but is so prejudicial that it is reasonably probable that exclusion would have produced a more favorable verdict; (2) due process is violated by the admission of state's evidence that has slight probative value, but is so prejudicial that there is no reasonable possibility, that it did not affect the verdict.

The Ninth Circuit has embraced the first and narrower of these two interpretations of due process:

> "Evidence introduced by the prosecution will often raise more than one inference, some permissible, some not; we must rely on the jury to sort them out in light of the court's instructions. Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must 'be of such quality as necessarily prevents a far [sic] trial.' " (*Jammal v. Van De Kamp*, 926 F.2d at 920 (footnote deleted).)

Jammal is consistent with California rules of evidence, which hold that,

> "Evidence is relevant when no matter how weak it may be, it tends to prove the issue before the jury. [Citation.] The weight of such evidence is for the jury." (*People v. Slocum*, 52 Cal.App.3d 867, 891, 125 Cal.Rptr. 442 (1975), cert. denied, 426 U.S. 924 (1978.) "[T]he trial court is vested with wide discretion in determining relevance under this standard." (*People v. Green*, 27 Cal.3d 1, 19, 609 P.2d 468 (1980).)

Apart from the charge as to which the challenged evidence was admitted, petitioner was charged with six

other counts relating to another child. Yet the jury acquitted petitioner of one count and deadlocked in various combinations as to the others. (ER 89.) Petitioner's claim that the jury was swayed by the evidence is therefore unavailing. The jury already knew petitioner was charged, in numerous counts, with molesting another child. They nevertheless carefully analyzed the evidence and considered each witness individually. The California Court of Appeal specifically found that the fact of an acquittal and a deadlock as to the remaining charges "indicates they continued to evaluate the evidence without being swayed by prejudice." (ER 95.)

It is also significant, in the due process context, that this was the only evidentiary error raised by petitioner. This case is therefore unlike other cases in which the cumulative effect of inadmissible evidence – often coupled with an erroneous instruction – justified reversal. (See, e.g., *McGuire v. Estelle*, 902 F.2d 749, 755 (9th Cir. 1990); see also *Jammal v. Van de Kamp* (1991) 926 F.2d 918; 1991 U.S. App. Lexis 3054 (No. 89-16377).)

CONCLUSION

Accordingly, for the reasons stated, appellant respectfully asks that the judgment be reversed.

DATED: August 7, 1991.

Respectfully submitted,

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Supervising Deputy Attorney General

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(3)

SUPREME COURT OF THE UNITED STATES

WILLIAM DUNCAN, WARDEN *v.*
ROBERT E. HENRY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 94–941. Decided January 23, 1995

PER CURIAM.

Respondent, a rector and dean of a church day school, was tried and convicted in state court of sexually molesting a 5–year-old student. At trial, respondent objected to testimony by the parent of another child who claimed to have been molested 20 years previously. His objection was based on Cal. Evid. Code Ann. §352 (West 1966). On direct appeal, he pursued his evidentiary objection and requested the appellate court to find that the error was a "miscarriage of justice" under the California Constitution. California applies this provision in determining whether or not an error was harmless. *People* v. *Watson*, 46 Cal. 2d 818, 299 P. 2d 243 (1956). The California Court of Appeal found the error harmless and affirmed respondent's conviction. *People* v. *Henry*, No. CR23041 (2d Dist. 1990), App. D to Pet. for Cert. 6.

Respondent then filed a petition for writ of habeas corpus in federal court, alleging that the evidentiary error amounted to a denial of due process under the United States Constitution. The District Court granted the petition and the Court of Appeals for the Ninth Circuit affirmed. *Henry* v. *Estelle*, 33 F. 3d 1037 (1994). The court held that respondent had exhausted his state remedies even though he had not claimed a violation of any federal constitutional right in the state proceedings:

> "In his direct appeal in state court, Henry did not label his claim a federal due process violation; he

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> argued rather that Hackett's testimony was erroneously admitted because irrelevant and inflammatory, and that its admission resulted in a 'miscarriage of justice' under the California Constitution. . . . However, to state a federal due process claim it is not necessary to invoke 'the talismanic phrase "due process of law"' or cite 'book and verse on the federal constitution'. . . ." *Id.*, at 1040 (citations omitted).

In *Picard* v. *Connor*, 404 U. S. 270, 275 (1971), we said that exhaustion of state remedies requires that petitioners "fairly presen[t]" federal claims to the state courts in order to give the State the "'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights" (some internal quotation marks omitted). If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court. Accord, *Anderson* v. *Harless*, 459 U. S. 4 (1982).

Picard and *Harless* control the outcome in this case. Respondent did not apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment. The failure is especially pronounced in that respondent did specifically raise a due process objection before the state court based on a different claim—that the pleading was uncertain as to when the offense occurred. App. D to Pet. for Cert. 8. The California Court of Appeal analyzed the evidentiary error by asking whether its prejudicial effect outweighed its probative value, not whether it was so inflammatory as to prevent

a fair trial. 33 F. 3d, at 1046. As recognized by dissenting Judge Brunetti, those standards are no more than "'somewhat similar,'" *id.*, at 1047, not "virtually identical" as claimed by JUSTICE STEVENS. *Post*, at 3. Both *Picard* and *Harless* emphasized that mere similarity of claims is insufficient to exhaust. *Picard*, *supra*, at 276; *Harless*, *supra*, at 6. The state court, when presented with respondent's claim of error under the California Evidentiary Code, understandably confined its analysis to the application of state law.

Accordingly, the petition for a writ of certiorari is granted and the judgment of the Court of Appeals is

Reversed.

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring in the judgment.

I concur in the judgment because respondent's "miscarriage of justice" claim in state court was reasonably understood to raise a state law issue of prejudice, not a federal issue of due process. Consequently, no federal claim was "fairly presented to the state courts" within the meaning of *Picard* v. *Conner*, 404 U. S. 270, 275 (1971).

JUSTICE STEVENS, dissenting.

Today's opinion sets forth a new rule of law that is a substantial departure from our precedents. In my opinion, it is unwise for the Court to announce a new rule without first hearing argument on the issue. The Court's opinion is especially distressing because it creates an exacting pleading requirement that serves no legitimate purpose in our habeas corpus jurisprudence.

In *Picard* v. *Connor*, 404 U. S. 270 (1971), after full briefing and argument, the Court issued an opinion carefully explaining the rule that a state prisoner must exhaust his state-court remedies before applying for a federal writ of habeas corpus. We held that the exhaus-

tion requirement is satisfied when "the federal claim has been fairly presented to the state courts." *Id.*, at 275. We made it clear, however, that the prisoner need not place the correct label on his claim, or even cite the Federal Constitution, as long as the substance of the federal claim has been fairly presented.

As we explained: "Obviously there are instances in which 'the ultimate question for disposition,' *United States ex rel. Kemp* v. *Pate*, 359 F. 2d 749, 751 (CA7 1966), will be the same despite variations in the legal theory or factual allegations urged in its support. A ready example is a challenge to a confession predicated upon psychological as well as physical coercion." *Id.*, at 277. Thus, until today, prisoners have not been required to exhaust their federal claims "by citing 'book and verse on the federal constitution.'" *Id.*, at 278 (citation omitted). Rather, the rule has been simply that they must present "the substance of a federal habeas corpus claim . . . to the state courts." *Ibid.*

Today the Court tightens the pleading screws by adding the requirement that the state courts "must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution." *Ante*, at 2. As support for that proposition the Court cites *Picard* and *Anderson* v. *Harless*, 459 U. S. 4 (1982), but neither case is in point. In the former, the Court pointed out that the claim asserted in state court—that an indictment was invalid under Massachusetts law—was different from the equal protection claim first raised in federal court; in the latter, the Court carefully explained why it concluded that the state-law basis for objecting to a jury instruction differed from the federal rule announced in *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). While I disagreed with the view that Harless' federal claim had not been fairly presented to the state courts, see 459 U. S., at 9–12 (dissenting opinion), I surely did not understand the Court's opinion to hold that the exhaustion doctrine includes an exact labeling requirement.

Nor have the Courts of Appeals demonstrated any such understanding of *Harless* or *Picard*. To the contrary, the Circuits have analyzed the exhaustion question without rigidly insisting that a prisoner invoke the "talismanic" language of federal law. See *Tamapua* v. *Shimoda*, 796 F. 2d 261, 263 (CA9 1986); see also, *e.g.*, *Hawkins* v. *West*, 706 F. 2d 437, 439–440 (CA2 1983); *Lesko* v. *Owens*, 881 F. 2d 44, 50 (CA3 1989), cert. denied, 493 U. S. 1036 (1990); *West* v. *Wright*, 931 F. 2d 262, 266 (CA4 1991), rev'd on other grounds, 505 U. S. ___ (1992); *Satter* v. *Leapley*, 977 F. 2d 1259, 1262 (CA8 1992); *Bowser* v. *Boggs*, 20 F. 3d 1060, 1063 (CA10), cert. denied, 513 U. S. ___ (1994); *Nichols* v. *Sullivan*, 867 F. 2d 1250, 1252–1253 (CA10), cert. denied, 490 U. S. 1112 (1989); *Hutchins* v. *Wainwright*, 715 F. 2d 512, 518–519 (CA11 1983), cert. denied, 465 U. S. 1071 (1984).

The new rule the Court announces today is hypertechnical and unwise. It will prolong litigation without serving any valid purpose. The example of a challenge to a coerced confession cited in *Picard*, 404 U. S., at 277, illustrates the point. If a prisoner presents all his evidence to a state court, and if the standard for judging the voluntariness of a confession under state law is the same as under federal law, the state court has had a fair opportunity to pass on the claim regardless of whether the prisoner relies on both the state and federal constitutions or just the former. If the state courts have considered and rejected such a claim on state-law grounds, nothing is to be gained by requiring the prisoner to present the same claim under a different label to the same courts that have already found it insufficient. The cost of needless litigation is, however, significant both to the judicial system, see *Harless*, 459 U. S., at 8 (STEVENS, J., dissenting), and to persons like respondent who are imprisoned despite their meritorious federal claims.

In the case before us today, the Court of Appeals for the Ninth Circuit carefully analyzed the exhaustion

issue. On the merits, respondent presented the Court of Appeals with a federal due process claim, the crux of which was that the testimony of Thomas Hackett, a witness for the prosecution, was so inflammatory and irrelevant as to render his trial fundamentally unfair. Cf. *Estelle* v. *McGuire*, 502 U. S. 62, 75 (1991) (severely prejudicial evidentiary errors may violate due process). Respondent had challenged the admission of Hackett's testimony on direct appeal in state court. 33 F. 3d 1037, 1040 (CA9 1994). To be sure, he had cited only state law. *Ibid.* As carefully explained by the Court of Appeals, however, the standards for addressing respondent's state-law claims were virtually identical to those applied in federal court on habeas review. *Id.*, at 1041–1042. Thus, after full discussion of the issue, the Ninth Circuit concluded that respondent had exhausted his claims.[1]

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[1]The contrast between the Ninth Circuit's thoughtful opinion and this Court's cursory disposition of an important issue is best illustrated by quoting the lower court's reasoning in full:

"To satisfy the exhaustion requirement, the petitioner must have fairly presented the substance of his federal claim to the state courts. *Picard v. Connor*, 404 U.S. 270, 277–78 . . . (1971). The purpose of this 'fair presentation' requirement is to 'provide the state courts with a "fair opportunity" to apply controlling legal principles to the facts bearing upon his constitutional claim.' *Anderson v. Harless*, 459 U.S. 4, 6 . . . (1982) (quoting *Picard*, 404 U.S. at 276–77). We have held that a federal claim 'is fairly presented if the petitioner has described the operative facts and legal theory upon which his claim is based.' *Tamapua v. Shimoda*, 796 F.2d 261, 262 (9th Cir. 1986).

"There is no doubt that Henry presented the 'operative facts' to the California court. The question is whether he presented the 'legal theory.' Henry's federal habeas claim is that the erroneous admission of evidence at his state criminal trial, followed by the jury instruction, violated his federal constitutional right to due process and was so prejudicial as to require reversal of the conviction. In his direct appeal in state court, Henry did not label his claim a federal due process violation; he argued rather that Hackett's testimony was erroneously admitted because irrelevant and inflammatory, and that its admission resulted in a 'miscarriage of justice' under the California Constitution. Cal. Const. art. VI, § 13. However, to state a federal due process claim it is not

necessary to invoke 'the talismanic phrase "due process of law" ' or cite 'book and verse on the federal constitution;' petitioner need only make 'essentially the same arguments' before the state and federal courts to exhaust a claim. *Tamapua*, 796 F.2d at 262–63. Thus, under *Picard* and *Anderson*, exhaustion requires only that petitioner present 'the substance of the federal claim' in state court. *Id.* at 262. We find that Henry has done so, regarding both his argument that the erroneous admission of the testimony and the instructional error were a violation of his federal due process right and his argument that the error was so prejudicial as to warrant reversal.

"As to the first point, it is well established that denial of due process in a state criminal trial 'is the failure to observe that fundamental fairness essential to the very concept of justice. [The court] must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial.' *Lisenba v. California*, 314 U.S. 219, 236 . . . (1941). Henry's federal due process claim is that the admission of Hackett's testimony, along with the instructions concerning it, deprived him of a fair trial. He argues that Hackett's testimony was not probative of any material issue in his case unless the jury assumed a fact about which it had heard no testimony: that Hackett's son's accusation was true. He further argues that the jury instructions encouraged the jury to make this impermissible, highly prejudicial assumption. His claim is thus that 'there are *no* permissible inferences the jury may draw' from Hackett's testimony, and that it is 'of such [inflammatory] quality as necessarily prevents a fair trial.' *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991); *see also Estelle v. McGuire*, 502 U.S. 62, [70] . . . (1991) (inflammatory evidence that is irrelevant may work a due process violation).

"Henry made 'essentially the same arguments,' *Tamapua*, 796 F.2d at 262, in his opening brief to the California Court of Appeal. He claimed that Hackett's testimony was 'not relevant—it had no tendency to prove or disprove any disputed fact that was of consequence to the determination of the action.' He added that the jury instruction 'compounded the error' because, in encouraging the jury to see Hackett's testimony as relevant, it 'as much as said that defendant had molested [Hackett's son] 20 years before.' The Court of Appeal agreed, and wrote in its disposition that Hackett's testimony, while 'inherently inflammatory,' had 'no probative value at all.'

"We reach the same conclusion as to the essential identity of Henry's state and federal arguments regarding the prejudicial effect of the error. Under California law, a miscarriage of justice is reversible only when 'it is reasonably probable that a result more favorable to [defendant] would have been reached in the absence of the error.' *Watson*, 299 P.2d at 254. The federal standard, recently set forth by the Supreme Court in *Brecht*

Judge Brunetti dissented from the majority's analysis, but on a ground that is entirely different from that advanced by this Court in what appears to be its holding.[2] He did not merely argue that there was no exhaustion because the prisoner had failed to cite the Federal Constitution. Rather, he carefully explained his view that the federal claim differed from the state claim

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v. Abrahamson, [507] U.S. ___ . . . (1993), is phrased somewhat differently, but is essentially the same test; the Supreme Court held that in reviewing a collateral challenge based on a 'trial-type' constitutional error, a federal court will not reverse the conviction unless the error '"had substantial and injurious effect or influence in determining the jury's verdict."' *Id.* at ___ [(slip op., at 1)] . . . (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 . . . (1946)).

"The errors that occurred at Henry's trial—the introduction of Hackett's testimony and the subsequent jury instruction—were clearly errors of the 'trial type' because they 'occurred during the presentation of the case to the jury.' *Arizona v. Fulminante*, 499 U.S. 279, 307 . . . (1991). Therefore, under the new *Brecht* harmless error standard, we must inquire whether the testimony had a 'substantial and injurious effect or influence' on the verdict. This standard is similar to the *Watson* standard used by California courts; under both tests, reversal is required if the error had a significant inculpatory impact. When the California Court of Appeal determined that it was not 'reasonably probable' that Henry would have been acquitted had the Hackett testimony not been introduced (the *Watson* standard), it effectively determined that the testimony had not had a 'substantial and injurious effect or influence' on the outcome (the *Brecht* standard).

"Henry has thus made 'essentially the same arguments' before the state and federal courts regarding both the existence of federal constitutional error and the prejudicial impact thereof. We hold that he has exhausted his state post-conviction remedies." 33 F. 3d, at 1040–1042 (footnote omitted).

[2] At the end of its opinion, the Court seems to back away from any iron-clad labeling requirement by endorsing Judge Brunetti's view that respondent's federal claim was different in important respects from the argument that was presented in state court. If the Court seeks to reverse the Ninth Circuit on these grounds, without overruling the rule of *Harless* and *Picard*, much of the language in the Court's opinion is nothing more than unnecessary dicta. The confusion on this critical point is itself a reason to avoid summary disposition of this case.

because it was governed by the harmless-error standard in *Chapman* v. *California*, 386 U. S. 18 (1967), rather than a California standard similar to *Brecht* v. *Abrahamson*, 507 U. S. ___ (1993). I am inclined to believe that the majority had the better of the argument because the *Brecht* standard would apply in the federal habeas proceeding. But the important point of the dissent is that, like the majority, it correctly perceived the exhaustion question as whether the claim had been fairly presented to the state courts, not whether respondent had attached the correct label.

This Court should not abruptly terminate thoughtful debate among conscientious Circuit judges by summarily announcing a new rule. If we are to depart from the standard set forth in *Picard* and *Harless*, we should do so only after thorough consideration with the benefit of full briefing and argument. I respectfully dissent.